# TRANSCRIPT OF RECORD.

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## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

## No. 129.

THE KANAWHA & MICHIGAN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

*vs.*

T. L. KERSE, ADMINISTRATOR OF THE ESTATE OF
THOMAS P. BARRY, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE
OF WEST VIRGINIA.

FILED APRIL 14, 1914.

(24,167)

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## RECORD.

## In Case No. 1740.

T. L. KERSE, as Administrator of the Estate of Thomas P. Barry, Deceased,

vs.

THE KANAWHA & MICHIGAN RAILWAY COMPANY, a Corporation.

(Pleas Before the Judge of the Circuit Court for the County of Kanawha, at the Court House Thereof, on the 27th Day of August, 1913.

Be it remembered, that heretofore, to-wit: On the 28th day of February, 1913, came the Plaintiff by his attorneys and sued out of the Circuit Court Clerk's Office of Kanawha County, a summons in Case against the said Defendant; which Summons with the return of the Sheriff thereon endorsed, is in the words and figures following, to-wit:)

### *Summons in Case.*

The State of West Virginia to the Sheriff of Kanawha County, Greeting:

We command you that you summon The Kanawha & Michigan Railway Company, a corporation, if it be found in your bailiwick, to
appear before the Judge of our Circuit Court, for the County of
Kanawha, at Rules to be held in the Clerk's office of said
2 Court, on the first Monday in March next, to answer T. L.
Kerse, as administrator of the estate of Thomas P. Barry,
deceased, of a plea of Trespass on the Case, Damage $10,000.00 and
have then there this writ.

Witness, Ira H. Mottesheard, Clerk of our said Court, at the Court House of said County the 28th day of February, 1913, and in the 50th year of the State.

IRA H. MOTTESHEARD, *Clerk.*

### *(Return.)*

Executed the within process upon the within named The Kanawha & Michigan Railway Company, a corporation, this 1st day of March, 1913, by delivering an office copy thereof to L. P. Ecker, the auditor of said corporation, in person, in Kanawha County, West Virginia; the said L. P. Ecker being then and there a resident of said Kanawha County; neither the attorney appointed pursuant to law to accept service of process for said corporation, or upon whom process against said corporation shall or may be served, nor the president, secretary, cashier, treasurer, or other chief officer, nor any director or other officer or agent of said corporation, being found within said county or within the said State of West Virginia.

BONNER H. HILL,
*Sheriff of Kanawha County, West Virginia.*

(And at another day, to-wit: At Rules held in the Circuit Court Clerk's Office of Kanawha County, on the first Monday in March, 1913, came the Plaintiff by his attorney and filed his Declaration against said Defendant, which Declaration is in the words and figures following, to-wit:)

3 State of West Virginia,
*County of Kanawha, To wit:*

In the Circuit Court Thereof.

T. L. Kerse, as administrator of the estate of Thomas P. Barry, deceased, plaintiff, complains of The Kanawha & Michigan Railway Company, a corporation, defendant, of a plea of trespass on the case.

For this, to-wit: That heretofore, to-wit, on the 23rd day of April, 1911, and for a long time prior thereto, the said defendant Kanawha & Michigan Railway Company was and had been the owner and operator of a certain railroad, equipped with locomotives, engines, tenders, cars, carriages and other appliances, and extending from a point known as Gauley Bridge, in Fayette County, West Virginia, through the counties of Fayette, Kanawha, Putnam and Mason, in said state, and into and through the state of Ohio to a point known as Corning in said last named state; which said railroad, owned and operated as aforesaid by said defendant, was then and there, and for a long time prior thereto had been, a common carrier of goods and passengers, and engaged in commerce between the said state of West Virginia and the said state of Ohio, and also in commerce between said State of West Virginia and other states through which its connections the Chesapeake & Ohio and the Baltimore & Ohio railroads, then and there passed; that the said decedent, on the day and year last aforesaid, was employed and in the employment of said defendant and common carrier, and at the time of the injuries and 4 grievances hereinafter complained of, was employed by said defendant and common carrier in commerce between the several states of the Union, to-wit, between the said state of West Virginia and the state of Pennsylvania, and was employed as a brakeman in interstate commerce as aforesaid; that the Kanawha Brewing Company, a corporation, on the day and year last aforesaid, was and for a long time prior thereto had been engaged in the manufacture and sale at wholesale of beer and other malt liquors, and was the owner of a manufacturing plant therefor, situate at Charleston, in said Kanawha County and state of West Virginia, on Bullitt street in said city, which said manufacturing establishment was connected with the railroad of said defendant by a certain switch or side-track, over

and along which said switch or side-track the said defendant ran its said engines, tenders, cars and carriages for the purpose of transporting the products of said brewing company to market and for other purposes. And plaintiff avers that on the day and year last aforesaid it then and there became and was the duty of said defendant to use and exercise reasonable care and caution to furnish to its employees, and particularly to plaintiff's decedent, a reasonably safe place in which and reasonably safe conditions under which to work: and especially was it the duty of said railroad company to use reasonable care and caution to keep its said railroad and railroad line, and the switches and side-tracks connected therewith, over and upon which it was necessary for the employees of said defendant, in the due course of their employment, to pass, in a reasonably safe condition,
and reasonably free from dangerous obstacles or obstructions,
5 for the safety and protection of the servants and employees
of said defendant who in the due course of their employment
were required to pass over and along the railroad of said defendant and the switches and side-tracks connected therewith. But the plaintiff avers that notwithstanding its said duty in the premises, and entirely unmindful thereof, the said defendant wro*gn*fully, carelessly and negligently failed, refused and neglected to perform its duty in the premises as aforesaid, and especially its duty to said decedent, in this, to-wit: That some time prior to the day and year last aforesaid the said brewing company had placed and fixed a certain piece of wood, of a certain thickness and width, to-wit, about two inches thick and six inches wide, across the switch or side-track aforesaid connecting with the railroad of said defendant, and extending from the bottling house of said brewing company to a certain building then and there used by said brewing company, which said board or plank crossed said switch track at a height about three feet above the top of an ordinary box car running over and along said switch or side-track; that of the presence of said board or plank at said point, and extending over said switch or side-track as aforesaid, the said defendant, on the day and year last aforesaid, had full knowledge, but of the presence of such board or plank at the point and in the position aforesaid the said decedent, on the day and year last aforesaid, was without notice or knowledge. And plaintiff avers that
the said defendant wrongfully, carelessly and negligently
6 allowed and permitted the said brewing company to erect and
maintain the said obstruction across the said switch or side-
track, and allowed and permitted the said obstacle to there remain, where the said employees of said railroad company in due course of their employment were required to pass, and especially where said decedent in the due course of his employment was required to pass; so that, on the day and year last aforesaid, in the due course of his employment as a brakeman by and for said defendant, while passing over and along said switch track, the said decedent was with great force and violence struck by and against said plank and obstruction, and was thrown from a box car then and there passing over and along said switch or side-track, and thereby and therefrom received such severe, serious and fatal injuries as that on the 23d day of April,

1911, he died, leaving surviving him a widow, Maud Barry, since deceased, and a son and child, John Thomas Barry, who is now in life, and was dependent upon said decedent, and for the benefit of whom this action is instituted and prosecuted. And plaintiff avers that the said decedent suffered the injuries aforesaid resulting in his death while he, the said decedent, was employed by the said railroad company in commerce between the states, the said railroad company being then and there a common carrier and engaged in commerce between the said state of West Virginia, the said states of Pennsylvania and Ohio and other states, and that such injuries were the direct result of the negligence of the said defendant, through its officers, agents and employees as aforesaid; to the damage of
7 the plaintiff, by virtue of the statute of the United States in such case made and provided, in the sum of ten thousand dollars ($10,000.00).

## Second Count.

And for this, also, to-wit: That heretofore, to-wit, on the 23d day of April, 1911, and for a long time prior thereto, the said defendant, Kanawha & Michigan Railway Company, was and had been the owner and operator of a certain railroad, equipped with locomotives, engines, tenders, cars, carriages and other appliances, and extending from a point known as Gauley Bridge, in Fayette County, West Virginia, through the counties of Fayette, Kanawha, Putnam and Mason, in said State, and into and through the State of Ohio to a point known as Corning, in said last named state; which said railroad, owned and operated as aforesaid by said defendant, was then and there, and for a long time prior thereto had been, a common carrier of goods and passengers; that the said decedent, on the day and year last aforesaid, was employed and in the employment of said defendant in the capacity of brakeman; that the Kanawha Brewing Company, a corporation, on the day and year last aforesaid, was and for a long time prior thereto had been engaged in the manufacture and sale at wholesale of beer and other malt liquors, and was the owner of a manufacturing plant therefor, situate at Charleston, in said Kanawha County and State of West Virginia, on Bullitt Street, in said City, which said manufacturing establishment was connected with the railroad of said defendant by a certain switch or side-track, over and along which the said defendant ran its engines, tenders, cars and carriages for the purpose of transporting the products of said brewing company to market and for other purposes. And plain-
8 tiff avers that on the day and year last aforesaid it then and there became and was the duty of said defendant to use and exercise reasonable care and caution to furnish to its employees, and particularly to plaintiff's decedent, a reasonably safe place in which and reasonably safe conditions under which to work; and especially was it the duty of said defendant to use reasonable care and caution to keep its said railroad and railroad line, and the switches and side-tracks connected therewith over and upon which it was necessary for the employees of said defendant, in the due course of their employment, to pass, in a reasonably safe condition, and reasonably free

from dangerous obstacles or obstructions, for the safety and protection of the servants and employees of said defendant who in the due course of their employment were required to pass over and along the railroad of said defendant and the switches and side-tracks connected therewith. But the plaintiff avers that notwithstanding its said duty in the premises, and entirely unmindful thereof, the said defendant, on the day and year last aforesaid, wrongfully, carelessly and negligently failed, refused and neglected to perform its duty in the premises as aforesaid, and especially its duty to said decedent, in this, to-wit: That some time prior to the day and year last aforesaid the said brewing company had placed and fixed a certain piece of wood of a certain thickness and width, to-wit, about two inches thick and six inches wide, across the switch or side-track aforesaid connecting with
the railroad of said defendant, and extending from the
9 bottling house of said brewing company, to a certain building
then and there used by said brewing company, which said board or plank crossed said switch track at a height about three feet above the top of an ordinary box car running over and along said switch or side-track; that of the presence of said board or plank at said point, and extending over said switch or side-track as aforesaid, the said defendant, on the day and year last aforesaid, had full knowledge, and for some time prior thereto had had full notice and knowledge; but of the presence of said board or plank at the point and in the position aforesaid the said decedent, on the day and year last aforesaid, was without notice or knowledge. And plaintiff avers that the said defendant wrongfully, carelessly and negligently allowed and permitted the said brewing company to maintain the said dangerous obstacle and obstruction across the said switch or side-track, and allowed and permitted the said obstruction to there remain, where the employees of said defendant, in the due course of their employment, were required to pass, and especially where said decedent, in the due course of his employment, was required to pass; so that, on the day and year last aforesaid, in the due course of his employment as a brakeman by and for said defendant, while passing over and along said switch track, the said decedent was with great force and violence struck by and against said obstacle and obstruction, and was thrown from a box car then and there passing over and along said switch or side-track, and thereby and therefrom received such severe, serious and fatal injuries as that on the 23d day of
April, 1911, he died. And plaintiff avers that the death of
10 said decedent as aforesaid was the direct result of the wrong-
ful, careless and negligent conduct of said defendant as aforesaid.

Wherefore the plaintiff says that by reason of the wrongs, grievances and injuries above complained of an action has accrued to him, as such administrator, to have and recover of and from the said defendant damages in the sum of Ten Thousand Dollars ($10,000.00); and therefore he brings his suite.

T. L. KERSE,
CATO & BLEDSOE,
*P. Q.*

(And at another day, to-wit: At a circuit Court for Kanawha County held at the Court House thereof on the 26th day of May, 1913.)

In Case. No. 1740.

T. L. Kerse, as Administrator of the Estate of Thomas P. Barry, Deceased,
vs.
The Kanawha & Michigan Railway Company, a Corporation.

This day came the parties, by their attorneys, and Nella Lorberg was sworn to take down the evidence in this case and well and truly report the same, and thereupon the plaintiff moved the Court to strike out and reject the plea of res adjudicata heretofore filed by the defendant, which motion, being argued by counsel and considered by the Court, was sustained, to which action of the Court, in sustaining said motion, the defendant objected and excepted. And thereupon the defendant moved the Court to dismiss this case and assigned reasons therefor: That in a former case involving
11 the same parties, a nonsuit had been taken by the plaintiff, and that this action had been brought without the former non suit being set aside, and without otherwise complying with the statute in that regard, which motion, being argued by counsel and considered by the Court, is overruled, to which action of the Court, in overruling said motion, the defendant objected and excepted; and thereupon the defendant demurred to the declaration and to each count therein, in which demurrer the plaintiff joined, and, the said demurrer being argued by counsel and considered by the Court, the defendant having assigned grounds, therefor, the said demurrer was overruled, to which ruling of the Court, in overruling said demurrer, the defendant objected and excepted. And thereupon the defendant says that it is not guilty as the plaintiff, in his declaration against it, has alleged, and of this it puts itself upon the country and the plaintiff doth the like, and issue is thereon joined. Then came a jury, to-wit: John Adkins, J. M. Blackwell, Albert Tulley, John Young, John F. Ewing, A. W. Templeton, Charles Coffman, G. W. Osborne, W. H. Stover, Joe Payne, Robert Withrow and Alfred Mooney, who being duly selected, empanelled and sworn to well and truly try the issue joined between the plaintiff and defendant, and a true verdict render according to the evidence, and having heard the evidence in part were adjourned until tomorrow morning at 9 o'clock.

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 27th day
12 of May, 1913.)

In Case. No. 1740.

T. L. KERSE, as Administrator of the Estate of Thomas P. Barry,
Deceased,
vs.
THE KANAWHA & MICHIGAN RAILWAY COMPANY, a Corporation.

This day came again the parties by their attorneys, and the jury heretofore empaneled and sworn appeared in Court pursuant to their adjournment of yesterday, and having heard the evidence in full for the plaintiff, the defendant moved the Court to strike out the evidence and direct a verdict for the defendant, which motion being argued by counsel and considered by the Court is overruled, to which ruling of the Court the defendant objects and excepts, and having heard the evidence in full, were adjourned until tomorrow morning at 9 o'clock.

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 28th day of May, 1913.)

In Case. No. 1740.

T. L. KERSE, as Administrator of the Estate of Thomas P. Barry,
Deceased.
vs.
THE KANAWHA & MICHIGAN RAILWAY COMPANY, a Corporation.

This day came again the parties, by their attorneys, and the jury heretofore empaneled and sworn appeared in Court pursuant to their adjournment of yesterday, and thereupon the defendant by counsel moved the Court to strike out all the evidence and direct a verdict for the defendant, which motion being argued by counsel and 13 considered by the Court, is overruled, to which ruling of the Court the defendant by counsel, objects and excepts, and having heard the argument of counsel in full retired to their chamber to consider of their verdict and after some time returned into Court, and upon their oaths do say, "We the jury find for the plaintiff & assess his damages at $1,200.00."

And thereupon the defendant by counsel moved the Court to set aside the verdict of the jury as being contrary to the law and the evidence and award it a new trial, which motion the Court takes time to consider.

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 2nd day of August, 1913.)

Trespass on the Case. No. 1740.

T. L. KERSE, as Administrator of the Estate of Thomas P. Barry, Deceased,
vs.
THE KANAWHA & MICHIGAN RAILWAY COMPANY, a Corporation.

This day came the parties, by their attorneys, and the motions made herein at a former term of this Court to enter a judgment for the defendant notwithstanding the verdict of the jury, and to set aside the verdict as contrary to the law and the evidence, being argued by counsel and considered by the Court, are, and each of them is, overruled; to which rulings of the Court, and each of them, the defendant, by counsel, objects and excepts.

14 It is therefore considered by the Court that the said plaintiff, T. L. Kerse, as administrator of the estate of Thomas P. Barry, deceased, do recover of and from the said defendant, The Kanawha & Michigan Railway Company, a corporation, the sum of One Thousand, Two Hundred Dollars ($1,200.00), with interest thereon from the date of the verdict herein until paid, and his costs in this behalf expended, including an attorney's fee of Ten Dollars as allowed by statute.

And the defendant expressing a desire to present to the Supreme Court of Appeals of West Virginia, a petition for a writ of error and supersedeas herein, it is further ordered that execution upon this judgment be suspended for sixty days from the date hereof, when the said defendant shall give bond before the clerk of this Court, with security to be approved by him, in the penalty of One Thousand, Five Hundred Dollars ($1,500.00), conditioned for the payment of all such damages as any person may sustain by reason of the said suspension in case a supersedeas to said judgment shall not be allowed and be effectual within said period.

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 27th day of August, 1913.)

Trespass on the Case. No. 1740.

T. L. KERSE, Admr., etc.,
vs.
THE KANAWHA & MICHIGAN RAILWAY COMPANY.

15 This day came the defendant, by its attorney, and asked that its Bills of Exceptions, Nos. 1, 2 and 3, be signed and sealed by the Court and saved to it on the record. And the Court having examined said Bills of Exceptions, Nos. 1, 2 and 3, doth order the same to be filed as a part of the record in this case, which is accordingly so done.

(Bill of Exceptions Number One referred to in the foregoing order is in the words and figures following, to-wit:)

## *Bill of Exceptions No.* 1.

T. L. KERSE, Admr., etc., Plaintiff,
vs.
THE KANAWHA & MICHIGAN RAILWAY COMPANY, a Corporation, Defendant.

Trespass on the Case.

Be it remembered that upon the trial of the above entitled case, after the jury had been duly empannelled and sworn as required by law, the plaintiff and the defendant to maintain the issues on their respective parts, introduced the evidence as taken down, transcribed, and certified by Nella Lorberg, Stenographer, who was duly appointed by the Court to report the evidence in said case and who, after being duly sworn, in the manner required by law, did report the evidence in said case, and transcribed and certified same, which transcript so signed and certified by her contains all of the evidence adduced upon the trial of said case, together with all of the rulings of the Court as to the admission and rejection of evidence, and all the motions, objections and exceptions of counsel for plaintiff and defendant, as noted in said transcript of evidence, and all of which evidence, motions, rulings of the Court and objections and 16 exceptions of counsel, and the depositions of Ella Amelia Barry, James C. Russell, A. E. King, S. R. Barr, and Myrtle Wigley, read in behalf of the defendants, are fully set out in said transcript of evidence, which evidence, motions, rulings of the court, and the objections and exceptions of counsel, are in the words and figures following, to-wit:

17 In the Circuit Court of Kanawha County, West Virginia.

T. L. KERSE, Adm'r of the Estate of Thomas P. Barry,
v.
KANAWHA & MICHIGAN RAILWAY CO.

Before Judge S. D. Littlepage and a Jury.

Appearances:

For the Plaintiff, Messrs. Cato and Barry;
For the Defendant, Messrs. King, Allebach and McDonald.

CHARLESTON, WEST VIRGINIA, May 26, 1913.

M. F. LEONARD, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. CATO:

Q. Give the stenographer your name?
A. M. F. Leonard.

Q. What is your age, and where do you live?

A. Age thirty-five years old; live here in Charleston.

Q. Are you married or single?

A. Married.

18 Q. What is your present occupation?

A. Engineer, on the K. & M.

Q. Engineer for the K. & M. Railway Company?

A. Yes, sir.

Q. Is that the same railroad company which is the defendant in this case?

A. Yes, sir.

Q. How long have you been in the railroad business?

A. Eight years.

Q. In what capacities have you worked?

A. Worked in the firing and running engine.

Q. How long have you been running an engine?

A. Two years and a half, three years next August.

Q. How long have you been a locomotive engineer for the K. & M. Railway Company?

A. About two years and eight months.

Q. By whom were you employed on the 23rd of April, 1911?

A. K. & M. Railroad Company.

Q. Did you know Thomas P. Barry in his lifetime?

A. No, sir.

Q. Did you know him by sight?

A. No, sir.

Q. Do you remember when Thomas P. Barry met his death?

A. I remember of it, yes. I don't remember of his death, only when he died.

Q. Do you remember when he was hurt?

A. Remember when he was hurt, yes.

19 Q. What were you doing at that time?

A. I was running the engine.

Q. At what place was he hurt, at what place of business, in whose place of business or near whose place of business?

A. Hurt out there at Kanawha Brewing Company's spur track.

Q. What time of the day was it?

A. Don't remember.

Q. You remember on what day of the week it was?

A. On Sunday, I believe, not sure.

Q. What was Barry doing on the day he was hurt; what connection, if any, did he have with the railroad company?

A. I don't know what he was doing, or whether he was employed by the railroad company or not. Working at the engine, breaking, that is the first I had seen him.

Q. Working as a brakeman on your train?

A. Yes.

Q. What was your train, what character of a train?

A. Yard engine.

Q. Then as I understand you, Barry was a member of the yard crew on that day?

A. Yes, sir, he had been working with it that day.

Q. You say you don't remember the time of the day he was hurt?

A. No, sir.

Q. Do you remember whether it was morning or afternoon?

20 A. Don't remember now whether it was in the forenoon or afternoon.

Q. Do you remember whether it was daylight or dark?

A. Yes, sir; daylight.

Q. Was there another brakeman on that yard crew that day?

A. Yes, sir.

Q. What was his name?

A. Jimmy Forbes.

Q. Who was the conductor of the train, of the crew?

A. James Wintz.

Q. James A. Wintz?

A. Don't know whether he has got A. in his initials or not.

Q. I will ask you to tell the jury the facts as you saw them? As to the way in which Thomas P. Barry was hurt or injured on that day, and wish you would speak slowly and distinctly as you can so that the jury may hear you?

Objection by counsel for defendant, which objection was overruled.

Exception.

A. Don't know anything about how he got hurt, only coming out there on the top of the car and a piece of timber across the track knocked him off, and just as I looked around I seen him get knocked off. All I can say about it. Just looked around in time to see him get knocked off.

Q. Did you see Mr. Barry when he first got on top of this car?

Objection.

21 A. No, sir.

Q. You say he was struck by a piece of timber across the track. Did you see him before the piece of timber hurt him?

Objection by counsel for defendant.

Objection overruled by the Court.

Exception.

A. Just at the time.

Q. At the time you saw him, how was he standing on the box car, was he facing and looking——

A. Standing sideways towards me. I looked just a mere glimpse of him, looked around and the way he was standing when he got struck.

Q. Standing with his side towards you?

A. Yes, sir.

Q. Face turned more towards the brewery or toward the temporary office there?

A. Don't know how he faced. Struck him on the side. Just as I looked around it hit him. Couldn't say which way he had been looking. Struck him on the side, is all, about the time I looked around.

Q. Do you remember at about what point Mr. Barry's body was struck by this timber?

A. Looked to me along about there (indicating).

Q. You mean about his hip?

A. Yes.

Q. Then where and when did you next see him?

22 A. Next place I seen him when I went back there he was laying on the ground.

Q. Was he lying on the track, or not?

A. No; he was lying in the middle of the track.

Q. In the middle of the track?

A. Yes.

Q. Where, at the time Barry was struck, if you know, was Mr. James Wintz, the conductor? Could you see him?

A. No; do not know where he was. Don't know where he was just at the time. Couldn't see him.

Q. Couldn't see him from your engine?

A. No.

Q. Who, if you know, was controlling the train at that time?

A. Mr. Wintz.

Q. Can you state to the jury where the two ends of this timber were fastened that struck Mr. Barry, between what points?

A. No, sir; I cannot tell how they were fastened. Never examined it.

Q. I mean this: can you tell to what two buildings, if any, the timber was fastened?

A. No; cannot tell what two buildings it was fastened to, because never went back to look.

Q. Was there any building on the side of the track opposite the bottling house of the brewery?

Objection by counsel for defendant.
Objection overruled by the Court.
Exception.

23 A. There was some kind of a building on the opposite side of the new bottling house.

Q. Was that a frame or brick building?

A. Frame—was not brick. Don't know what it was.

Q. Was either end of this timber fastened to that building?

A. Couldn't say. Don't know what the timber was fastened to.

Q. Do you know whether, when you saw Mr. Barry after going back and finding him on the ground, whether he was conscious or unconscious?

A. No; don't know whether he was unconscious or conscious.

Q. Did he have any injuries at that time that you could see?

Question objected to by counsel for defendant.
Objection overruled.
Exception.

A. Didn't see any injuries.

Q. Did you ever see Mr. Barry alive after that?

A. No, sir.

Q. Did you ever see him dead after that?

A. No, sir.

Q. What kind of a box car was that that Mr. Barry was on, with reference to its heighth; was it about the ordinary height, or not?

A. Looked like the rest of them.

24 Q. Mr. Leonard, in operating a train, that is, running the engine, who did you get your—at that time, whom did you get your orders from for the movement of the train, directly from, I mean?

A. Don't remember who I got the signal from at that time.

Q. I believe you testified you could not see Wintz?

A. At the time it happened, no, didn't see him.

Q. Who ordinarily gives the signals by which you might run the engine?

A. First one, then another. First the conductor and then the brakeman.

Q. Was Barry giving the signals for the movement of that particular train?

Objection by counsel for defendant to above question.
Objection overruled by the Court.
Exception.

A. Why, he give me signals any time that day when it was necessary to give me a signal.

Q. Barry did?

A. Yes, sir.

Q. What did you go in on that switch for that day, Mr. Leonard?

A. Don't know what we went in there for.

Q. I believe you say you know Mr. James Wintz?

A. Yes, sir; I know him.

Q. Did Mr. Wintz, the conductor of that train, tell you what was to be done on that switch that day?

25 A. He told me to take it to the brewery and get a crew out, and has to tell me, generally tells me what he wants me to do.

Q. Did he tell you what kind of a car and where the car was going, onto what train?

A. Said a car was for 99, if I remember right.

Q. Did he tell you anything about, whether the car was loaded or empty, or what was in it?

A. No, sir.

Q. To get a car out for 99?

A. (No answer.)

Q. What did he mean by 99?

A. I don't know what he meant.

Q. Did 99 mean the number of the train?

A. Got a 99 on the road, yes.

Q. What sort of a train is 99?

A. Freight train.

Q. Is it a through freight, or a local freight?

A. Second class.

Q. What is second class, a through freight, or local freight?

A. It is called a through freight.

Q. Is that what is called in railroad parlance a manifest?

A. Yes; what they call a manifest. Through freight.

Q. Where did that through freight called 99 run? What was the run of that freight?

A. From here to Hobson.

26 Q. Is Hobson in the State of Ohio?

A. Yes, sir.

Q. After Barry was hurt, did you take any cars out of that brewery switch that same day?

Question objected to by counsel for defendant.
Objection overruled. Exception.

A. I don't remember whether we did or not. There was a lot of excitement around there, and we fooled around with him, and I don't remember whether we taken the car out or not.

Q. Don't remember whether you took it out?

A. No, sir.

Q. But you were sent in there to take it out?

A. Well, he told me he wanted to get a car out of there.

Q. You don't mean to say that after going in there for the cars, you left them in there, do you?

Question objected to by counsel for defendant.
Which objection was sustained by the court.

Q. Is it, or not, a fact that you took one or more cars out of that switch on that Sunday, the same day Barry was killed?

A. I don't remember whether we did or not.

Q. Is or is it not a fact that the car Barry was on when he was killed was put onto train 99?

A. Couldn't tell you a thing in the world about it. Don't know what became of the car, the car we had hold of, or anything
27 about it.

Q. Do you know whether that car was taken off that switch for the purpose of putting it in train 99?

Question objected to by counsel for defendant.

A. No, sir; I don't.

(By the Court:)

Q. Was this track located between two buildings?

A. Why, it run between this new bottling house and the Kanawha Brewing stable.

Q. And this timber, or whatever it was, that you say struck him, was it extending from one building to the other?

A. I don't know what the timber was connected to. It was across the track, though.

Q. How wide apart are the buildings?
A. I don't know how wide they are.
Q. You have no idea?
A. No, sir; have no idea.
Q. Fifty feet?
A. Don't know how wide the track is.
Q. As much as fifty feet?
A. Might have been. I don't know.
Q. What size timber was it?
A. I don't know what.
Q. Don't you know what size timber it was?
A. I would have known if I had gone back and looked at it.
28 Q. Ten by twelve, or four by four plank, or pine tree, or what was it?

A. Best of my judgment, it looked to me like it was about 2 by 3. Something like that. Just looking at it. Of course I wasn't close to it any more than going under it, and I couldn't see it then.

(Mr. Cato, continuing:)

Q. How long had that piece of timber been across that track, if you know, Mr. Leonard, before this accident happened?
A. I don't know.
Q. How often before that had you seen it there?
A. I don't know how many times. Seen it once or twice, I guess.
Q. Before that day?
A. Yes.
Q. Had the one or two times you had seen it been on separate days, different days?
A. Yes, sir.
Q. Would you say that you had seen it there as long as a week before that accident?
A. No; I don't know whether it was a week or not. Two or three days. Something like that.
Q. How often did you go in on this track?
A. I don't know how often.
Q. How often had you been in on that track prior to the day Barry was killed,—within a week, or two before that?
29 A. I don't know. Didn't keep no record of that.
Q. Did I understand you to state to the jury that this was the first time you had ever seen Barry working on that train as a brakeman?

Question objected to by Counsel for defendant.
Objection overruled. Exception.

A. That is the first day I seen Mr. Barry.
Q. Mr. Leonard, I don't mean to ask you this question in order to contradict you, but to refresh your memory. Did you have a conversation with me today about what you know about this case?

Question objected to by counsel for defendant.
Objection sustained by the Court.

Q. Do you remember telling me to-day that Mr. Wintz told you to go in on this switch and get a car of beer for 99?

Objection by counsel for defendant.
Objection sustained by the Court. Exception.

A. No, sir.
Q. 99, the through freight you have described, would that be a freight train made up of loaded cars, or empties?
A. I don't know. It would be either one, I guess.
Q. Be either or both?
A. Be anything it wanted to be, I reckon. I don't know.

30 Cross-examination.

By Mr. King:

Q. Mr. Leonard, I wish you would state to the jury just what your duties are as engineer on the yard locomotive?
A. My duties are to just go according to signals and instructions, what I am told to do.
Q. You have nothing to do with making up of these trains?
A. Nothing to do where cars are to go, where to get them, whether they are empty, or anything.
Q. Except upon the signal of the conductor or brakeman?
A. That is all. Go according to his signal.
Q. And about how many cars would you estimate you would handle in a day, if you can estimate?

Question objected to. Overruled. Exception.
(Question withdrawn).

Q. Can you tell Mr. Leonard, how many cars you handled on that day or estimate how many?
A. No, sir, I couldn't tell. I could give kind of an idea. Maybe 150-200, something like that we handle.

Mr. Cato, counsel for plaintiff, moves that the last answer be stricken out. Overruled.

Q. Mr. Leonard, as I understood you to say in answer to Mr. Cato's question, you first saw Mr. Barry just before he was knocked off the car?
A. Just at the time.
31 Q. I will ask you if you know which way he was facing when you saw him?
A. I don't know exactly which way he was facing.
Q. Was he looking toward you?
A. No, not looking toward me at all.
Q. Was he looking toward the engine?
A. No, sir.
Q. Was he looking in the direction the cars were going?
A. No, sir. Don't know whether he was looking back when he came out of there, or whether he was looking over toward the brewery.
Q. But he was not looking the way the cars were running?

A. Not looking toward me. That was just the time I looked around and that was the time he was struck.

Redirect examination.

By Mr. Cato:

Q. When you got down after your accident and went around and saw Barry lying on the ground between the rails, back of this car, where was Mr. Wintz, the engineer, do you know, at that time, the conductor, at that time?

A. He was there.

Q. Where was the other brakeman at the time Barry was struck, if you know?

A. I don't know just exactly where he was. I don't know whether he was at the switch, but I did not see him.

32 It is admitted by counsel for defendant that the defendant Kanawha & Michigan Railway Company's line runs between Corning, Ohio, and Gauley Bridge, West Virginia, and further that it connects with the Baltimore & Ohio Railroad at Point Pleasant, West Virginia, and is a connection of the Toledo & Ohio Central Railway; and it is further admitted that the defendant company is a common carrier engaged in Interstate Commerce, and that said railroad further connects with the Chesapeake & Ohio Railroad at Gauley Bridge, West Virginia, and Charleston, West Virginia.

(By the Court:)

Q. Were you backing in there, Mr. Leonard, or going in with the engine in front?

A. Coming out, heading out.

Q. Heading out?

A. Yes.

Q. Going in there after cars standing in there?

A. What?

Q. Going in after cars standing in there?

A. I suppose so. Sometimes go in there and don't get any cars, and some times come out without them, and I just supposed we were going in there after cars.

Q. Do you know whether you coupled to any cars when you came out of there?

A. Yes, sir.

Q. And then you brought some out?

A. Did not get out with them.

Q. What stopped you?

33 A. Seen the man fall.

Q. Was that him on the last car coming out?

A. Yes, sir.

Q. And you stopped your train when you went back?

A. Yes, sir.

Q. What did you do with him after you went back?

A. Didn't do anything.

Q. Left him on the track?

A. Sure. Left him there until we—we stood around and looked at him a while, and picked him up, and carried him to the boiler room of the brewery and called the doctor and ambulance wagon.

Q. What condition was he in when you found him?

A. He was just lying there, that is all.

Q. Blood running out of him?

A. Little blood running out, but I don't know what part.

Q. You say there was blood on his face?

A. Yes, sir; that has been some time ago. Don't remember much about it just exactly.

(Mr. Cato, continuing:)

Q. Who coupled that car to the tender of your engine?

A. Don't remember that, who did.

Q. Whose duty was it to do that?

A. Any one that wanted to.

Q. Wasn't it the duty of the brakeman to make that coupling?

A. Sure; but I don't remember whether he was to make it
34 or whether the conductor.

Q. I believe you said you did not see the conductor until after Barry was hurt?

Objection by counsel for defendant.
Objection withdrawn.

Q. After you left Barry's body in the bottling house, where you say you carried it, or engine room, did you go back to your train?

A. Went back to my engine.

Q. Back to your engine?

A. Yes, sir.

Q. Did anybody uncouple that car you got in there, or not?

Objection to question by counsel for defendant.
Objection overruled.

A. I don't remember what we done. There was an extra on the main line, and we were all there, big crowd there, and I don't remember what we done.

Recross-examination.

By Mr. King:

Q. How long ago was this, Mr. Leonard?

A. Don't remember how long it has been. Could tell by my book. It seems to me like it has been about two years ago or more.

Q. Was Barry looking toward this piece of timber when you saw him? Was Mr. Barry looking toward the piece of timber across the track?

35 Question objected to by counsel for plaintiff.
Objection sustained.

Q. Mr. Leonard, when you saw Barry standing on the top of the car, where was this piece of timber, with reference to you and Mr. Barry?

A. Was between me and him.

Q. Was he looking toward that piece of timber?

Question objected to by counsel for plaintiff.

Q. He was not looking toward you, was he?

Objected by counsel for plaintiff.
Objection sustained by the Court.

A. No, sir; wasn't looking towards me at all, but I don't know which direction he was looking back from.

Q. But you know he wasn't looking toward you?

A. No, sir.

Q. Nor in the direction the cars were going?

A. Not at all.

(Witness excused.)

Adjournment until nine o'clock tomorrow morning.

36 In the Circuit Court of Kanawha County, West Virginia.

CHARLESTON, W. VA., May 27, 1913—9 o'clock a. m.

Appearances: Same as before.

GEORGE W. BOGGESS, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cato:

Q. What is your full name, Mr. Boggess?

A. Well—George W. is the way I write it.

Q. Where do you live?

A. Live in this city over on Pennsylvania Avenue.

Q. What is your business?

A. Carpenter.

Q. How long have you been working at the carpenter trade?

A. Couldn't hardly tell you. Right smart bit.

Q. Were you ever employed at the Kanawha Brewery—were you ever employee at the Kanawha Brewing Company?

A. Yes, sir; employed there building that bottling house.

Q. Do you remember when Thomas P. Barry was killed out there?

A. I remember hearing of it.

Q. Were you working there at the time?

A. No, sir.

Q. How long before he was killed, or about how long
37 after you left there?

A. It was about two weeks before I heard he was killed after I left there.

Q. Do you know anything about any timber or board that was put across the switch out there at the Kanawha Brewing Company while you were there?

A. Yes, sir.

Q. Who put that board across there?

A. Now—I couldn't exactly tell you the man that put it across there.

Q. Under whose orders was it done?

A. Mr. Nailor's.

Q. What was he doing there?

A. Foreman of the carpenter crew.

Q. Foreman of the carpenter crew, building the bottling house?

A. Yes, sir.

Q. What sort of a piece of timber or board was that?

A. Two by four.

Q. Where did it run from?

A. Run from the temporary office built there across to the building that we were building—bottling house.

Q. Temporary office across to the bottling house?

A. Yes, sir.

Q. Run across the track?

A. Yes, sir.

Mr. King: I move that all that be stricken out.

38 Overruled by the Court.

Q. You say this was a piece two by six. What material was it, if you know?

A. Best of my knowledge it was hemlock.

Q. And how was it fastened to this temporary office?

A. Nailed.

Q. And how was it fastened to the bottling house?

A. It was nailed.

Q. Now, how long before you left the Brewing Company work there was this obstruction put up?

A. I couldn't answer that question, exactly. It was put there—oh, I don't know.

Q. I mean approximately. Don't expect you to give the exact length of time.

A. Week or ten days, I expect. May be longer. Might have been a month, I couldn't tell.

The above answer objected to by counsel for defendant, but admitted with the understanding that the witness is to identify the piece of timber mentioned in the above answers as the piece of timber which caused the death of Mr. Barry.

Q. Mr. Boggess, was any other piece of timber put across that track than the one you have described running from the bottling house to the temporary office while you were there?

Question objected to by counsel for defendant.

Objection sustained by the Court.

39 Q. Do you know of any other timber being put across there while you were there?

A. I don't recollect of any other. Wasn't any other across when I left there.

Q. And when you left there this same piece of timber was across there?

A. There was a piece across there—I wouldn't say.

The foregoing answer objected to by counsel for defendant which objection was sustained by the Court.

Mr. Allebaugh: I want to renew the motion to strike out all this evidence.

Motion overruled.

Motion withdrawn.

Cross-examination.

By Mr. Allebach:

Q. Who were you working for at the time, Mr. Boggess?

A. I was working under instructions of Mr. Nailor. I was hired there to work for the brewery.

Q. And Mr. Nailor was foreman?

A. Boss. My understanding at that time we were putting up some steel—Pence Springs had a contract to put it up, we were more working for the Pence Springs Company.

Q. But this work was being done at the instance of the Brewing Company?

A. That was the Brewing Company's property we were working on, yes.

Q. Did the K. & M. Railroad have anything to do with this work?

40 Question objected to by counsel for plaintiff.
Objection overruled by the Court.

A. I don't know.

(Witness excused.)

41 Albert Wright, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cato:

Q. What is your name, Mr. Wright, full name?

A. Albert Wright.

Q. Where do you live?

A. On Estell Street.

Q. What do you do, Mr. Wright?

A. Work at the carpenter trade now.

Q. What were you doing on or about the 23rd of April, 1911,—who were you working for?

A. Working for the Kanawha Brewing Company.

Q. Kanawha Brewing Company?

A. Yes, sir.

Q. What were you doing for the Kanawha Brewing Company?

A. I was working in the bottling department. That is, looking after the orders, that is shipping out beer, and so on.
Q. Working in the bottling house?
A. Yes.
Q. Do you know anything about a piece of timber that was across the track, the switch track there, of the Brewing Company, on or about the 23rd of April, 1911?

Question objected to by counsel for defendant.
Objection overruled by the Court.
Exception.

A. Yes, sir, I know of it.
42 Q. Were you working for the Brewing Company when Thomas P. Barry was killed out there on that switch?

Question objected to by counsel for defendant, which objection was sustained by the Court.

Q. Were you working for the Kanawha Brewing Company when Thomas P. Barry was injured out there on that track?
A. Yes, sir.
Q. Do you remember about that?
A. Yes, sir; I remember of it.
Q. At the time he was injured there was there any piece of timber or obstruction across that switch track?

Question objected to as leading.
Objection sustained.

Q. At the time Thomas P. Barry was injured out there at the brewery on that switch, was there anything running across that Brewing Company's switch?

Question objected to by counsel for defendant.
Objection overruled by the Court.
Exception.

A. Yes, sir, there was a piece of timber across there.
Q. There was a piece of timber across there?
A. Yes, sir.
Q. I wish you would describe to the jury that piece of timber, the character of it?
A. Well, as well as I remember, it was a piece of timber either—well, something like a two by four or two by six, something like that. Never examined right close, you know, just the exact size of it, but it was something like that.
43 Q. To what, if anything, was this piece of timber fastened?
A. Why, it was fastened to the temporary office and run across to the new building.
Q. And run across from the temporary office?
A. To the new building of the bottling house.
Q. Was the bottling house then under construction, then being built?

A. The first floor was. We were working on the first boor.

Q. Could you say approximately how far above the top of an ordinary box car that piece of timber extended?

Objected to on the ground that the witness does not know anything about box cars.

Objection overruled.

Exception.

A. The best of my knowledge, it seemed it would be anywhere from three and a half to four feet above the top of the box car.

Q. Have you seen box cars and trains pass under that obstruction? Did you see them?

A. Yes, sir.

Q. How frequently did trains come in and out of that switch while that obstruction was there?

A. I never did just pay attention to how long that piece was up there, but I have known them to come in there quite often, probably as high as twice a day on that work.

Q. How long, if you remember, or about how long before Thomas
P. Barry was injured at that switch was this piece of timber
44 that you have described placed across that track?

A. Well, I couldn't say, exactly, but I suppose it was there anywhere from three to four weeks.

Q. During that period, did trains and switching engines and switching crews come in and out of that switch?

A. Yes, they came in quite often.

Q. About how frequently, would you say?

A. Oh, they would come in probably once or twice a day. I have known them to come in twice a day after cars or to set cars in.

Q. Did that switch over which this timber ran connect with the main line of the K. & M. Railroad or with the K. & M. Railroad tracks?

A. Yes, sir; it run right out to the main line. It run out there in to the Diamond Coal Company.

Q. Was the timber you have described across the tracks the only obstruction or the only timber running across that switch track from the time it was put there until the time Mr. Barry was injured, so far as you know?

Question objected to by counsel for defendant, which objection was overruled by the Court.

Exception.

No cross-examination.

(Witness excused.)

45 T. S. Richardson, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cato:

Q. Give your name to the stenographer?
A. T. S. Richardson.
Q. Where do you live?
A. In Charleston.
Q. What is your business?
A. Local freight agent for the K. & M.
Q. For what company?
A. K. & M. Railroad.
Q. The K. & M. Railroad, is that the defendant in this case?

Mr. Allebaugh: Yes, we will admit it.

Q. How long have you been employed by the K. & M. R. R.?
A. About thirteen years.
Q. How long have you been acting as freight agent of the K. & M. Railroad?
A. About three years.
Q. Were you freight agent for the K. & M. on the 23rd of April, 1911?
A. Yes, sir.
Q Do you know where the switch leading past the bottling house of the Kanawha Brewing Company and connected with the K. & M. Railroad is?
A. Yes, sir.
46 Q. Do you keep in your office a record of the cars placed on and taken from the different switches in this city connected with the K. & M.?
A. Yes, sir.
Q. I mean, of course, cars taken—put on those switches and taken off those switches by the K. & M. R. R.?
A. Yes, sir.
Q. Have you in your office any record of any car or cars taken from the Kanawha Brewing Company's switch on Sunday, April 23, 1911.
A. We don't keep a record of them Sundays.

No cross-examination.

(Witness excused.)

47 John T. Barry, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cato:

Q. Give your full name to the stenographer, Mr. Barry?
A. John Thomas Barry.

Q. How old are you?
A. Nineteen years old.
Q. Where do you live?
A. Washington, D. C.
Q. Are you the son of Thomas P. Barry, for whose death this suit is brought?
A. Yes, sir.

Question objected to by counsel for defendant and asked to be ruled out, on the ground that it has not been proven that Thomas P. Barry is dead, or that he was ever married.
Question withdrawn.

Q. Are you the son of Thomas P. Barry?
A. Yes, sir.

Same objection as above.

Q. Are you the son of the Thomas P. Barry for whose alleged death this suit was brought?

Objected to by counsel for defendant.
Sustained.

Q. Are you the son of the Thomas P. Barry and the Maud Barry described in the declaration in this case?

Objected to by counsel for defendant.
Sustained.

48 Q. Do you know whether Thomas P. Barry was married?
A. I guess he was, or I don't see how I would have been here.

Counsel for defendant ask that the answer be stricken out.

Q. Are you the reputed son of Thomas P. Barry and Maud Barry?
A. Yes, sir.
Q. Where did your father and mother live after you were old enough to remember or know them?
A. Well, when they got married they lived in Williamsport, Maryland, until I was born, and after that came to Washington.

Counsel for defendant moves that the answer be stricken out.
Motion overruled.
Exception.

Q. Do you know where your father and mother were married?
A. In Baltimore.
Q. Baltimore, Maryland?
A. Yes.

Question and answer objected to and moved that it be stricken out.

Q. By whom were they married?

Objection.
Question withdrawn, and also question previous to that.

Q. What do you do, now, Mr. Barry, what is your occupation, if any?

49 A. Not doing anything at present.

Q. Not this particular moment?

A. Haven't any job at present.

Q. What was the last job you did?

A. Working for Nicholson, hanging awnings.

Q. That was in Washington?

A. Yes, sir.

Q. Before that what were you doing?

A. Wasn't able to do nothing much.

Q. You say you weren't able to do much at all?

A. No, sir.

Q. Why not?

A. Because I was sick.

Question and answer objected to.
Overruled.
Exception.

Q. Have you been able to earn your own living the last few years?

A. No, sir.

Objection.
Overruled.
Question withdrawn.

Q. During your father's lifetime, did he contribute in any way to your support, if so, to what extent?

A. Yes, as far as I know, he did.

Q. Do you know whether he did?

A. He sent money in letters to mama to take and get me clothes and my support.

Q. At the time of your father's death, did you get the benefit of any of his estate?

A. Yes, I got insurance in the Brotherhood of Railroad 50 Trainmen; that is, I got part of it.

Q. Who got the rest of it?

Objection.

Q. You say you got a part of it?

A. Yes.

Q. Who got the rest of that insurance?

Objection.
Question withdrawn.

Q. Who has the rest of it?

Objection.
Sustained.

Q. To whom was this insurance money paid?

Counsel for defendant objects to any evidence being introduced about the insurance.

Q. Do you know whether or not your father, Thomas P. Barry, is dead?

A. Do I know whether he is dead or not?

Q. Yes.

A. Yes, sir.

Q. Were you present at his funeral?

A. No, sir.

Q. Where was he buried?

A. Hagerstown.

Counsel for defendant objects to the foregoing and asks that it be stricken out.

Overruled.

Last question withdrawn.

Q. Do you know Rosser F. Downing, of Washington, D. C.?

A. Yes, sir.

Objection.

51 Q. Who is he?

A. Administrator and guardian.

Q. Of whom?

A. Of me.

Q. What fund, if any, belonging to you is Mr. Downing disbursing?

Objection.

Sustained.

The plaintiff offers to prove by the witness that Rosser F. Downing is guardian of the witness and became such after the death of Marion L. Thompson; that the mother of the witness was in life at the time of her husband's death, and the money paid on a certain policy of insurance held by Thomas P. Barry was paid one-third to Rosser F. Downing, as administrator of the estate of Thomas P. Barry and the remaining two-thirds to Marion L. Thompson, as guardian of John Thomas Barry, the witness, and that since that time his mother has died; that the said Thompson since the payment of such money to him as guardian has deceased, and that Rosser F. Downing succeeded him as guardian of the witness; and that the witness has been partly supported out of the funds in the hands of Rosser F. Downing, his guardian, derived from such insurance policy, and the remainder of such fund is now held by said Downing for the benefit of the witness and to be used in his maintenance and support.

52 To which facts put in the form of question objection was made by counsel for the defendant, which objection the Court sustained, to which ruling of the Court the plaintiff excepted.

Q. When did your mother die, with reference to the time of your father's death?

A. Died December 22, 1911.

Q. December 22, 1911. Where did she die?

A. In Washington, D C.

Q. Were you living there at that time, in Washington?

A. Yes, sir.

Q. Were you living with her at that time?

A. She just came from the hospital. I was stopping at my Aunt's then.

Q. Prior to her going to the hospital had you been living together?

A. Yes.

Cross-examination.

By Mr. King:

Q. Was Thomas P. Barry living with your mother at the time of the accident?

A. No, sir.

Q. How long before that had it been since he had lived with her?

A. I don't know, exactly.

Q. Had he ever lived with her after you were old enough to know?

A. No, sir.

53 Q. Are you acquainted with James Stafford Taylor?

A. Yes, sir.

Q. Who is he?

A. My grandfather.

Q. He is the father of Maud Taylor Barry?

A. Yes, sir.

Q. Will ask you if you have lived at the home of James Stafford Taylor?

A. Oh, we lived there when Mama took and left Papa.

Q. How long did you live there?

Question objected to by counsel for plaintiff.

Which objection was overruled by the Court.

A. How long did we live there?

Q. Yes.

A. Well, I guess from until I was about five or six years old.

Q. Then where did you live?

A. Well, then Mama she got married again.

Q. Whom did she marry that time?

A. William George Haas.

Q. Were you present at that marriage?

Question objected to by counsel for plaintiff.

A. No, sir; I did not go to that.

Question objected to on the ground that that has nothing to do with the issues in this case.

Objection overruled by the Court.

Exception.

Q. Do you know when that marriage occurred?

54 A. Not exactly, no sir.

Q. About how many years ago?

A. I don't know, exactly. If I knew that would know when it had taken place.

Q. Could you estimate, just approximately?

A. I should say it was between twelve and fourteen years,—something like that; I don't know exactly.

Mr. Cato: We want the record to show, Your Honor, an objection to each one of these question- along this line.

Q. While you lived at the home of James Stafford Taylor, did you pay any board to James Stafford Taylor?

Question objected to as not proper cross examination.
Objection overruled.

A. I never paid to him, myself. I couldn't see how I could. I was too young to pay him, but I suppose Mama took and gave him money my father sent for my support and paid to him.

Q. Do you know that she did?

A. I know that she received money, and I was clothed and she didn't work.

Q. But you don't know that she paid James Stafford Taylor any money?

A. I don't know positively whether she paid him any money or not.

Q. Are you able to state to the jury how often these letters were received.

55 A. I should say about once a month. Maybe they would not come for every two months.

Q. When did the last letters come?

A. Well, Mama received letters right along up until she died.

Q. Did she receive letters from this man, with money in them, after she was married to Haas?

A. Certainly. But not for her, for me.

Q. Were you able to see how much was in any of those letters?

A. I should say it run from ten to twenty.

Q. Did you ever see one of those letters?

A. Yes, sir, I have seen the letters.

Q. Did you ever see the letter while the money was in it?

A. Yes, I seen her take money out of the envelope.

Q. Do you know how much mony was in that envelope?

A. Ten tc twenty dollars.

Q. In this letter that you saw her take out of the envelope?

A. You mean any particular letter?

Q. Yes.

A. A certain amount?

Q. Yes.

A. Oh, don't remember any particular letter, what amount was in there, but it run from ten to twenty dollars.

56 Q. After your mother married Mr. Haas, you still lived at your grandfather's, did you not?

A. No, sir.

Q. Where did you live then?

A. Always stayed with my mother as a rule. Of course sometimes I would take and visit my grandfather and grandmother.

Q. Can you say what part of the time you were with your mother and what part of the time you were with your grandfather?

A. Not exactly. Couldn't say, because I take and visit him sometimes, say a week or so, and then I would go back — him, because Mama was like myself, delicate in health, and we would go to the country pretty near every Summer.

Q. When, if at all, did you ever see your—or did you see Thomas P. Barry?

A. First time I ever seen him I was ten years old.

Q. How long had it been before you heard Thomas P. Barry was killed?

A. How long after that time?

Q. How long had it been before that until you had seen him?

A. I don't quite understand what you mean.

Q. How long before Thomas P. Barry's death had you seen him, how long had it been?

A. Oh, I was about twelve—between twelve and thirteen the last time I seen him.

Q. And now you are?

57 A. Nineteen.

Q. I will ask you to state to the jury how you knew these letters that came with money in them came from Thomas P. Barry?

A. Why, I took and seen the letters.

Q. Were you familiar with his signature?

A. Yes, sir.

Q. Did you ever see him sign his name?

A. I have seen his name. Don't know whether I could remember it exactly now, but I was pretty well acquainted with his handwriting.

Q. Did you ever see him sign anything?

A. Not in person, never there when he signed it.

Q. So that anything you say as to this being his writing you have from information of others, and not from your own observation?

A. What is that?

Q. You say you never saw him sign his name, so that any information you have as to this being his signature and his writing comes from other persons, and is not from your personal observation?

Objection to question.

A. No, I never seen him sign a letter in person, never seen him sign or take a pencil in his hand and do any writing at all. There is something I would like to say.

A. Little while ago you asked me how long Mama had received those letters. I said "up until she died." I did not mean
58 that, I meant up until he was killed, until he died.

Redirect examination.

By Mr. Cato:

Q. Before your father's death, were you ever able entirely to support yourself by your own efforts?

A. No, sir; I always was delicate.

Question objected to as leading.
Sustained.

Q. Before your father's death, did you support yourself entirely by your own efforts?

Question objected to and objection sustained by the Court.

Q. Since your father's death, have you been able to support yourself, or have you supported yourself through your own efforts and without the use of the money derived from the insurance policy that you speak of?

Question objected to by counsel for defendant.

Objection overruled.
Exception.

A. No; I almost entirely relied upon the insurance policy.
Q. What has been the state of your health since your father's death, good or bad?

Objected to.
Sustained by the Court.

Q. Mr. Barry, do you know what your father's earnings were as a brakeman in the employment of the K. & M.?

Objected to.

59 A. I don't know exactly; but I should think it run about——

(By the Court:)

Q. You say you don't know?
A. Don't know exactly.

(By Mr. Cato:)

Q. Do you know the date of your father's death?
A. 23rd of April, 1911.
Q. Do you know how much your father earned from April 1, 1911, to April 23, 1911?

Objected to.

The Court: Answer yes or no, witness.
A. Seventy-five dollars and forty-five cents.

Counsel for defendant asks that the answer be stricken out.
The Court: I will admit that answer.

Recross-examination.

By Mr. King:

Q. Did you ever see this policy of insurance about which you talked?
A. Have I ever seen the policy itself?
Q. Yes.

A. No, sir.
Q. You don't know to whom it was made payable, then?
A. Yes, sir.
Q. To whom was it made payable?
A. Was made payable to Mary Barry.
Q. Who is Mary Barry?
A. My grandmother.

60 Objection.
Overruled.

Q. Mary Barry is the mother of Thomas P. Barry, isn't she?
A. Yes, sir.

Mr. Cato:

Q. John, do you know whether Mary Barry, the mother of Thomas P. Barry, was dead at the time of your father's death, whether she died before your father or not?
A. She died before my father.
Q. And she wasn't in life when the policy matured?
A. No, sir.

(Witness excused.)

61 Everett D. Hudson, a witness of lawful age, being first duly sworn, testified as follows:

Q. What is your name, Mr. Hudson?
A. Everett Hudson.
Q. Where do you live, Everett?
A. 1314 Bigley Avenue, Charleston, West Va.
Q. What is your age?
A. Twenty-six.
Q. What is your present occupation?
A. Selling sewing machines.
Q. Sewing machine agent?
A. Yes, sir.
Q. Were you ever employed by the defendant, the Kanawha & Michigan Railway Company?
A. Yes, sir.
Q. For what length of time?
A. A little over two years.
Q. Were you working for the K. & M. Railway Company in April, 1911?
A. Yes, sir.
Q. Were you employed by that company on the 23rd of April, 1911?
A. I was.
Q. Did you know Thomas P. Barry in his lifetime?
A. Yes, sir.
Q. In what capacity were you employed on April 23, 1911?

A. Don't remember. Don't know whether brakeman or conductor. 62

Q. When did you last see Thomas P. Barry in life, Mr. Hudson, living?

A. On the 22nd day of April.

Q. That was on Saturday, or not?

A. Yes, sir.

Q. Did he then appear to be in good health or otherwise?

A. Appeared to be in good health.

Q. What sort of a man was he, physically, in appearance, I mean, if you know?

A. Do you mean stout?

Q. Stout, or otherwise?

A. Stout man.

Q. Stout man?

A. Yes.

Q. How long did you know him before his death?

A. Little over a month.

Q. You know about what his height was?

A. He looked like about six feet.

Q. Do you know whether or not Thomas P. Barry is now dead?

A. I know he is dead.

Q. How do you know it?

A. I taken him home.

Q. You took him home from where?

A. From Charleston.

63 Q. You mean you took his body home?

A. Yes, sir.

Q. In what capacity, as a member of some committee, or what?

A. Member of Brotherhood of Railroad Trainmen.

Q. When after his death did you leave Charleston, with the body, what day of the week was it?

A. Tuesday morning.

Q. How soon after his death did you first see Barry, that is, see his body?

A. Seen it on the 24th.

Q. On the 24th?

A. Yes, sir.

Q. Where was that?

A. At the undertaker shop, Simpson's.

Q. Was he then in his coffin?

A. Yes, sir.

Q. Mr. Hudson, do you know where the switch connecting the plant of the Kanawha Brewing Company with the K. & M. Railroad is, and was, on April 23, 1911?

A. Yes, sir.

Q. Are you familiar with that switch?

A. Yes, sir.

Q. Do you know anything of any obstruction or obstacle of any sort stretched across that switch at the time Thomas P. Barry was killed?

Objection as leading.
Sustained by the Court.

64 Q. Do you know of anything that was across that switch track at the time Thomas P. Barry was killed?

Objection overruled.
Exception.

Q. On the day that Thomas P. Barry was killed?
A. That day, I don't know of anything on that day.
Q. Don't know about that day?
A. No, sir.
Q. Do you know of anything across that track on the day before he was killed?

Objection as having nothing to do with this accident.
Objection overruled.
Exception.

A. Know there was some scaffolding work over the track the day before.

Counsel for defendant moves that the answer be stricken out because it is not in response to the question; the answer should be yes or no.

Objection.
Overruled.
Exception.

Q. Wish you would describe that scaffolding work to the jury, and tell them what it was?
A. There was two pieces two by six held across from one building to the other over the track.
Q. Between what buildings, Mr. Hudson?
A. Kanawha Brewing Company and the temporary office. Had some pieces nailed upon the office and these two pieces nailed to them.
Q. You say it was nailed to the Brewery building. What house, or what building of the Brewing Company was it nailed to?

65 Objection.
Overruled.

A. Nailed to the bottling house and temporary office there.
Q. You say you saw that there on the day before Barry was killed?
A. Yes, sir.
Q. Was there any other piece of timber crossing that switch track, on that day, except the one you describe?

Objection to question.
Overruled.
Exception.

A. No, sir.
Q. How did you happen to see that timber across there on that day?

Objection.

A. I was in the——

Objection withdraw-.

A. I was passing through there and saw it.
Q. Passing how?
A. Going down the track.
Q. Were you walking or on the train?
A. Was walking.
Q. Do you know how long, or about how long, that timber had been across that track before Barry was hurt there?
A. Been up there little over a week.
Q. How long?
A. Little over a week.

66 Q. Can you say how far or about how far above the top of an ordinary box car that timber crossed that track?
A. Can't say for sure. It looked like it would be about two or three feet, about two or three feet.
Q. Mr. Hudson, at that time, April 23, 1911, was there a train, a freight train, running over the K. & M. known by the K. & M. as Train 99?
A. Yes, sir.
Q. What kind of a train was that?
A. It was a through train, freight train.
Q. Through freight train?
A. Yes.
Q. Between what points did it run?
A. Dickinson to Columbus.
Q. Columbus what state?
A. Ohio.
Q. And Dickinson is in what state?
A. West Virginia.
Q. In what state and county is the switch of the Kanawha Brewing Company, while you are testifying along that line?
A. What state and county?
Q. Yes.
Q. Kanawha County, West Virginia.
Q. You say train 99, through freight, ran from Dickinson to Columbus. Can you state what its schedule of stops was between those two points, that is, on April 23 1911?

67 A. Stopped at Hobson and Corning, Columbus and Charleston.
Q. In what state are the station stops of Hobson and Corning?
A. In Ohio.
Q. In what state and county is Charleston?
A. Kanawha County, West Virginia.
Q. In the pursuit of your employment by the railroad company, how frequently did you get in and out of this switch at the Kanawha Brewing Company plant?
A. How often did I go in?
Q. Yes.

A. From one time to twice each night.
Q. And day?
A. Night. I worked at night.
Q. Is there any rule or custom of the Kanawha & Michigan Railway Company to post a bulletin showing any dangerous track condition or any obstruction on or over the tracks of that company or any switch connected with those tracks?

Objection.

Q. Or was there any such custom or rule on or about the 23rd of April, 1911?

The Court: The last part of your question is admissible; the first part is not.
Question withdrawn.

Q. On or about the 23rd day of April, 1911, was there or was
there not any rule or custom on the part of the defendant
68 company, Kanawha & Michigan Railway Company, to post
a bulletin pointing out to the employees of the company any
dangerous track condition, or any obstacle on or obstruction or obstacle over or across its tracks or the tracks of switches with which it connected and over which its employees were required to pass?

Objection to question.
Objection overruled.
Exception.

A. It was.
Q. What is that custom, and where was such bulletin posted?

Objection by counsel for defendant.
Question withdrawn.

Q. What was the custom of the railroad company in this respect?

Objection to question by defendant's counsel.
Objection overruled.
Exception.

A. If anything dangerous over the tracks or any dangerous tracks, they were supposed to notify their employees by bulletin in the general office.
Q. Where, in case of such a circumstance as this, is it the custom, and was it the custom at that time, to post such a bulletin?

Objected to by counsel for defendant.
Objection sustained.

Q. Where was it customary to post such a bulletin as you have described?
A. Well, often in the yardmaster's office, or find it in the
69 general office.
Q. Was, or was there not, any bulletin posted in either of these places prior to the injury to Barry or afterwards, pointing out this particular obstruction or timber over the track?

Objection.

Q. Was or was not any bulletin posted by the K. & M. Railway Company at either of these places prior to the injury of Thomas P. Barry pointing out the piece of timber spanning the track on the Kanawha Brewing Company's switch that you have described?

A. There wasn't.

Q. There was not?

Objection.

Overruled.

Q. Did you see that timber there on the 24th day of — the day after Barry was killed?

Objection.

Sustained.

Cross-examination.

By Mr. Allebach:

Q. How did you find out that timber was there that day?

A. I was in there.

Q. Where did you see it first?

A. Seen it same place I described.

Q. Where were you, on the track or on the cars, when you first saw it?

70 A. Right almost up against it.

Q. How often did you see it after that?

A. After the first time?

Q. Yes.

A. Seen it every time I went in there; every day.

Q. Did you keep looking for it?

A. Yes, sir.

Q. Then the first you knew it was there you saw it yourself?

A. Yes, sir.

Q. From what point on that Brewing track could you see that stick of timber over the track?

A. Seen it after I got in there.

Q. How far from the stick of timber?

A. About fifty yards, I suppose.

Q. That is toward the main line?

A. Yes, sir.

Q. Then from a point as you come in from the main line you could see that stick of timber fifty yards from where it was over the track, could you?

A. Yes, sir.

Q. How, on the other side of the timber how far could you see it?

A. Could see it about 100 yards on the other side.

Q. Now these bulletins that you were talking about. They were put up for the warning of conductors and engineers, weren't they?

71 A. All railroad employees. You have got to read them just the same as conductors or engineers, brakemen has to go through it too.

Q. How long did you work in yard service?

A. Worked almost three years.

Q. What will you say as to the danger of braking in yard service as compared with braking on the main line?

Objection.
Overruled.

A. It is about twice as dangerous to brake in the yard as on the main line.

Q. Why is it more dangerous?

A. Because when a man goes on the main line and gets up on the engine all he has to do, in the yard he has got to ride cars all the time, run in side tracks in dangerous places where there is no room in the cars to clear a man.

Q. What would you say about the degree of watchfulness necessary to a brakeman or conductor in yard service while performing his duties?

Objection.
Overruled.
Exception.

A. He has got to keep his eyes open.

Q. What are some of the reasons, Mr. Hudson, why a conductor or brakeman in yard service must keep his eyes open?

Objection by counsel for defendant.
Overruled by the Court.
Exception.

A. Because yard service is dangerous.

Q. Give some of the reasons?

72 A. The reason is because the tracks are so close if you don't keep your eyes open you will get killed and won't know how you got killed.

Q. Did you work any with Mr. Barry?

A. Yes, sir.

Q. What would you say about his apparent skill as a railroader?

A. He was a good one.

Objection.

Q. How would you prove that a child was not skillful in a place to work?

A. That a child was not skillful?

Q. Yes, that a child was not a skilful person to put in as a brakeman?

Objection.
Question withdrawn.

Q. What was your position in the crew when you were working with them?

A. Brakeman.

Q. He was a brakeman and you a brakeman in the same crew?

A. Yes, sir.

Q. Did you observe his actions as a brakeman?
A. Yes, sir.
Q. Tell the jury what kind of a brakeman he was?

The Court: At the time he was injured.
Mr. Allebaugh: He just knew him thirty days before.

73 Q. How long before the accident had you worked with him, Mr. Hudson?
A. About a couple of weeks before.
Q. What kind of a brakeman was he at that time?

Objected to by counsel for plaintiff, which objection is sustained.

A. Seemed like a pretty good brakeman.
Q. Did he show a knowedge of signals, switches, etc.?
A. Yes.

Objection by counsel for plaintiff.
Objection sustained. Exception.

(Witness excused.)

74 B. S. Preston, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cato:

Q. Give your name to the stenographer?
A. B. S. Preston.
Q. What is your profession?
A. Physician.
Q. Where do you live, Doctor?
A. Charleston.
Q. Were you living in Charleston on the 23rd of April, 1911?
A. I was.
Q. Were you practicing your profession there?
A. I was.
Q. How long have you been a practicing physician?
A. Eleven years.
Q. Do you know where the McMillan Hospital is?
A. I do.
Q. Did you know Thomas P. Barry in his lifetime?
A. No, sir.
Q. Did you ever see Thomas P. Barry in life?
A. Yes, sir.
Q. When and where did you see him?
A. At the McMillan Hospital the day of his injury on the railroad. The date I don't remember.
Q. Do you remember what day of the week it was?
75 A. I think it was Sunday.
Q. Do you know how long after he received his injuries that you saw him?
A. I think it was about an hour, possibly, or hour and a half.

Q. What was his then condition as to consciousness or unconsciousness?

A. As I saw him he was in a—I don't question him—he was in a stupor. I considered him unconscious, without going into the condition.

Q. Would that be a condition sometimes referred to as a comatose condition?

A. Yes, sir.

Q. Amounting to that?

A. Yes, sir.

Q. Do you know how long he lived after you saw him?

A. I didn't. I only saw him. Walked in the room and saw him, and from what I saw there afterwards; it was probably four or five hours, possibly six hours.

Q. Did you after you saw him learn he was dead?

A. I did.

Q. And when did you learn he was dead?

A. I think it was the following day.

Q. Following day?

A. Yes, sir. Understand, the condition made little impression on me from the fact that I was not directly interested in the case.

76 Q. You didn't then, make any careful examination of him?

A. I did not.

Q. Can you state from the examination you did make whether or not he died of the injuries he received in the railroad accident in which he was hurt?

Objection.

The Court: Can you answer that question, doctor?

A. I have to assume that his injury was received on the railroad.

Mr. King:

Q. You don't know that, do you, Doctor?

A. I do not, only what I was told.

(Question withdrawn.)

(Mr. Cato:)

Q. Can you state from your examination of Barry whether or not he died from some sort of violent injury?

A. Undoubtedly he did.

Q. And from your examination, how long before you saw him had this injury been received?

Objection by counsel for defendant.

Objection overruled by the Court.

A. Ask that question again.

Q. From your examination of Barry such as you made, can you say, approximately, how long before you saw him he had received his injuries?

A. It is impossible to state any definite time, from the examination I made, as to how long since his injury.

77 Mr. Cato: Your Honor, we will end our direct examination for the present, but we might desire to recall Dr. Preston for further questions in case we cannot supplement his evidence by the evidence of Dr. McMillan.

Cross-examination.

By Mr. King:

Q. How did you learn, Doctor, that this man was dead?
A. I am unable to tell you, Mr. King. I think that Dr. McMillan stated to me that he was dead. It was merely a statement made by some one connected with the hospital. Just who it was I don't remember.

(Witness excused.)
Whereupon a recess was taken until 1:30 o'clock p. m.

78 In the Circuit Court, Kanawha County, West Virginia.

CHARLESTON, WEST VA., May 27, 1913.—1:30 p. m.

Appearances: Same as before.
The depositions of Rosser F. Downing, taken in Washington, D. C., on agreement of counsel, on behalf of the plaintiff, were read by Mr. Cato; the cross-examination read by Mr. King.

W. A. MCMILLAN, a witness of lawful age, being first duly sworn, testified as follows:

Q. Give your name to the stenographer?
A. William A. McMillan.
Q. Where do you live, sir?
A. Charleston, West Virginia.
Q. What is your profession?
A. Physician and surgeon.
Q. How long have you been in the practice of your profession, Doctor?
A. Ten years.
Q. How long have you been practicing in Charleston?
A. Ten years.
Q. Are you, or are you not, the surgeon of the defendant Kanawha & Michigan Railroad Company?
A. Yes, sir.
Q. Were you such surgeon for that company in April, 1911?
A. Yes, sir.
79 Q. Did you ever know Thomas P. Barry in life?
A. Yes, sir.
Q. What were the circumstances under which you knew him?
A. He was admitted to the hospital on April 23, 1911.

Q. Do you recall whether that was on a week day or on a Sunday?

A. Sunday.

Q. You say "to the hospital". Do you conduct a hospital in this city?

A. Yes, sir.

Q. What is the name of it?

A. McMillan Hospital.

Q. Did you see him on that day before or after he arrived at the hospital?

A. Before.

Q. Where did you see him first?

A. I went out to the scene of the accident.

Q. To the scene of the accident, where was that?

A. At the brewery.

Q. Kanawha Brewing Company?

A. Yes, sir.

Q. Where was Mr. Barry when you saw him there? Was he indoors, or lying——

A. They carried him in the brewery. He was lying down on a stretcher or cot.

Q. Inside the brewery?

80 A. Yes.

Q. Do you recall about what time of the day that was?

A. That was about between two and four in the afternoon.

Q. Did you make an examination of him when you were called there?

A. Just a superficial examination.

Q. What, if anything, were his external injuries, that is, his apparent injuries.

A. If my memory serves me right, he had some evidence of hemorrhage from his ears and nose, and was breathing heavily, and presented a picture of shock.

Q. Were there any cuts or contusions on his body?

A. Not on his body, they were confined to the scalp.

Q. Were there any such on his scalp?

A. He had some evidence of a head injury.

Q. Was the scalp lacerated—was there an abrasion of the skin of the scalp?

A. He, as far as I recall, had some abrasions, but not sufficiently great to warrant any surgery.

Q. You mean stitching?

A. Yes.

Q. Was there any blood on him?

A. Yes; blood was coming from his nose and his ears, one ear, anyway.

Q. Would that indicate, or not, that he had received a severe blow on the head?

81 A. It might be induced by such an accident.

Q. What was done with Mr. Barry after that?

A. As soon as I realized that the injury was of a serious nature, I immediately summoned the ambulance and had him sent to the hospital.

Q. At the time you saw him at the brewery was he conscious or unconscious?

A. Unconscious.

Q. Do you know whether he died at your hospital?

A. Yes, sir.

Q. When did he die?

A. He died about five o'clock, as near as I can recall.

Q. In the afternoon of the same day?

A. Yes, sir.

Q. Did he ever regain consciousness?

A. No, sir.

Q. Can you state, from your examination of Mr. Barry, whether his death was due to some violent injury as distinguished from organic or other disease?

A. The death, in my opinion, was due to hemorrhage in the brain. Hemorrhages are induced easily or according to the past life of the individual. If a man has been an alcoholic drinker, or if he has been suffering from rheumatism or syphil*i*s a rupture of the arteries is very easily produced and hemorrhage can result from a blow on the head with the fist or stick or falling on the sidewalk.

82 Q. What, in your opinion, was the cause of the death of Mr. Barry?

A. The cause of the death was evidently the result of this accident.

Q. This railroad accident?

A. Yes.

Q. And you think, do you not, that his death was due to the blow or shock which caused the abrasion on the scalp of which you speak?

A. Beg pardon?

Q. You think, do you not, that his death was due from the hemorrhage resulting from the shock or injury which caused the injury to the scalp?

A. To the skull, do you mean?

Q. Or to the skull under the scalp?

A. Yes.

Q. Can you state approximately what aged man Barry appeared to be?

A. He had a look of being older than he really was. As far as I can recall the man, he was prematurely grey,—a man who had lived a life more than his years.

Cross-examination.

By Mr. King:

Q. What do you mean by your last statement, that "he was a man who had lived a life more than his years"?

A. One of the most learned m*a*n of the medical profession said that a man is as old as his arteries. The man who drinks whiskey suffers a great deal from sickness and lives a bad, irregular

83 life, wickedness or sin, or whatever you wish to call it, he is not going to stand as much injury and he is bound to die

earlier as a result. I mean that if a man is fifty years of age, for instance, in years fifty years from the date of his birth, and by the condition of the arteries that carried the blood on through his body, that artery registers blood pressure a certain point, say at 240—the normal point is 125—that man is more than fifty years of age in reality, therefore his arteries are the indication of his age, not the number of his years. His past life made him live his life out.

Q. From the indications you found in this man, what sort of a life would you say he had lived?

Question objected to by counsel for plaintiff, as no evidence of any such examination has been made.

Objection sustained.

Q. What I want, Doctor, is to get an explanation of what you meant when you said he had lived a life more than his years?

A. Well, I explained the cause, Your Honor, of a man being older than his arteries, or being older in years than his age. His appearance would indicate that he is older than he really is, so from that fact formed the opinion that he had lived a life of some form of intemperance, might be intemperance of habits,—any habit.

84 Redirect examination.

By Mr. Cato:

Q. You did not make any examination which would prompt you to state that Barry at the time of his death was a victim of or suffering from alcoholism, did you?

A. Yes, sir; he had a pint of whiskey on his person.

Q. Having the whiskey on his person wouldn't be sufficient to intoxicate Barry, would it?

A. Yes, sir.

Q. It would have to be in his person?

A. Yes, sir.

Q. Did you make any blood pressure test after your patient, Mr. Barry, went to the hospital, or before?

A. Blood pressure tests and all delicate tests, patients in emergencies are not—I did not do such a thing.

(Witness excused.)

85 T. L. Kerse, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cato:

Q. Give your name to the stenographer?

A. T. L. Kerse.

Q. Where do you live, sir, and what is your age?

A. Thirty-three. Live in Charleston, West Virginia.

Q. What is your profession or occupation?

A. Attorney at law.

Q. Are you the T. L. Kerse who is named in this suit and in the declaration in this suit as the administrator of the estate of Thomas P. Barry, deceased?

A. I am.

Q. Are you, in fact the regularly and duly qualified administrator of Thomas P. Barry?

A. I am.

Cross-examination.

By Mr. King:

Q. What other matters in that estate, Mr. Kerse, have you had to administer except the bringing of this suit, if any?

Question objected to by plaintiff's counsel as irrelevant.
Objection sustained.

Plaintiff rests.

And thereupon the defendant moved the Court to arrest the evidence from the jury, and to direct a verdict for the defendant, 86 which motion being argued by counsel and the Court being fully advised in the premises, the Court doth overrule, to which ruling of the Court on said motion the defendant at the time objected and excepted.

James Forbes, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Allebach:

Q. Give the stenographer your name?

A. J. G. Forbes.

Q. What is your business, Mr. Forbes?

A. Yard brakeman.

Q. For what railroad?

A. K. & M.

Q. How long have you been employed as a yard brakeman?

A. I have been with the K. & M. for about eighteen years.

Q. During that time how much of that time have you spent in the Charleston yard as brakeman?

A. All of it.

Q. Are you thoroughly acquainted with the Charleston yard and its various switches, etc.?

A. Yes, sir.

Q. Did you know Mr. Thomas P. Barry while he was alive?

A. Yes, sir.

Q. How was he engaged at the time you knew him?

87 A. As a brakeman.

Q. For whom?

A. For the K. & M. Railway Company.

Q. What kind of a brakeman was he, Mr. Forbes?
A. Good brakeman.
Q. I mean, was he yard brakeman or main line brakeman?
A. Yard brakeman,—good yard man.
Q. Did he work in the same crew with you?
A. Yes, sir.
Q. How long had he been working with you when he was killed?
A. I think he worked all the time from the time he was employed by the K. & M. with me on the same crew.
Q. About how long was that, Mr. Forbes?
A. It was something like a month. Don't know just exactly how long it was.
Q. Where was he killed?
A. At the Kanawha Brewing Company.
Q. How was he killed?

(By Mr. Cato:)

Q. Did you see Mr. Barry killed?
A. No, sir.

(Mr. Allebaugh:)

Q. On the afternoon that Mr. Barry was killed, where were you?
A. At the time Mr. Barry was killed I was out on the main line on some box cars that we had cut off on the main line when we went in there on the engine.
Q. What were you doing out there?
88 A. I was waiting for Mr. Barry to bring the cars that he went in there for to couple on to those that I had on the main line.
Q. You didn't see Mr. Barry killed, did you?
A. No, sir.
Q. You said a few minutes ago that Mr. Barry was a good brakeman. Upon what did you base your answer?

Question objected to by counsel for plaintiff, which objection was overruled.
Exception.

A. Well, as I have been following the business, he was an active man and understood his business, and any man that follows the work knows the man he works with, whether he was working with a railroad man or a green man, and Mr. Barry was an experienced man on the work.
Q. What can you say as to the dangerous character of the employment as freight brakeman?

Question objected to by counsel for plaintiff, which objection was sustained. Question withdrawn.

Q. Were you aware of any obstructions across the Brewing Company's side spur?
A. Yes, sir.

Q. What is that obstruction?

A. Two pieces of timber across from the bottling house to the little temporary office they had on the opposite side of the track.

Q. About how high above an ordinary box car was this obstruction which you speak of?

89 A. About four feet and a half.

Q. How long had it been there prior to Mr. Barry's injury?

A. Well, I don't know. Don't know that, but I think it was pretty near the whole time Mr. Barry was working for the company, —must have been there something like a month.

Q. How do you know it was there?

A. By going on cars in there switching.

Q. Was Mr. Barry aware of its being there?

Question objected — by counsel for plaintiff.
Question withdrawn.

Q. What knowledge of this strip did Mr. Barry have?

Question objected to by counsel for plaintiff.
Objection overruled. Exception.

A. Why, I told Mr. Barry to be careful and watch this piece of timber, myself, and I and Mr. Barry had passed under it ourselves, and we had to get down this way (witness stoops quite low) to get under the piece of timber on the box car, and I told him several times about watching.

Q. Watching for what?

A. For different things in switching and——

Q. And about this strip?

A. —and where the cars lots of times, when we were switching I would say, "watch that car, it don't clear a man."

90 Answer objected to by counsel for plaintiff, and move that it be stricken out. Sustained by the Court, that so much of the answer as states conversation had by the witness with other persons than Barry is stricken out.

Cross-examination.

By Mr. Cato:

Q. You say Barry and you had often gone under this obstruction together, or you had often seen Barry go under it when he was braking on the same train with you?

A. Yes, sir.

Q. You had often seen that?

A. Yes, sir.

Q. And you and he had stooped under this projection or obstruction on the top of the same box car together?

A. Yes, sir.

Q. How did you have to stoop to get under it?

A. (Witness stoops nearly double).

Q. Like that?

A. Yes, sir.

Q. What, then, was the occasion of your telling Mr. Barry that this obstruction was there, if you have gone under it together that way?

A. I told Mr. Barry—I don't know whether at that time, but I told Mr Barry when he first commenced to work, about this piece of timber there, even cautioned him when we would go in 91 there that there was a piece of timber there, because I knew it was there.

Q. Barry and you both went in there together, did you?

A. Yes, sir.

Q. And both of you stooped down like this, and got under it?

A. Yes, sir.

Q. And why did you tell him it was there?

A. I had told Mr. Barry it was there before we ever went in there together.

Q. And before ever Barry went in there?

A. Yes, sir; it was probably twice a day, and sometimes three times a day that we would go in there. Of course I didn't tell Mr. Barry every time to look out you would get knocked off.

Q. Mr. Barry, you say, was an experienced brakeman?

A. Yes, sir.

Q. And you recognized just as soon as you went to work with him that he was an experienced workman?

A. Yes, sir.

Q. Mr. Barry, so far as you know, had perfectly good eye-sight, didn't *you?*

A. Yes, sir.

Q. Good eye sight?

A. Yes, sir, as far as I——

Q. He could see this obstruction himself?

A. Yes, sir.

92 Q. Then why did you take it upon yourself to tell him?

A. I did every man that comes to work in the yard, experienced men or not. He does not know all those places we have. There is a *man* place a man cannot go on the side of a box car at all, and I always tell those men, if you have been railroading all your life and went into a new place you would not know all those places.

Q. In other words, there are a great many dangerous places around the yards and switches that you have to tell the other employees about?

A. Yes, sir. I have been working for the railroad 18 years.

Q. Are you required by the company, you especially, to notify employees of obstructions and dangers?

A. No, sir.

Q. Every time you would go under this, or Mr. Barry would go under it, you told Mr. Barry to watch out for this obstruction?

A. No; I said a little bit ago that I didn't do that.

Objection. Overruled.

Q. When you were out watching these cars on the main line, waiting for Barry to come out from this switch, those cars you were watching for were to be put unto another train, weren't they?

A. No, I think they were to go in the yard. They wasn't through cars at all. We were just switching cars and getting empties for different places which would give empties to other industries.

93 Just switching, getting empty cars. We weren't making up any train at all.

Q. You don't know, then, as a matter of fact—you say you "think"—what was to be done with these cars you were watching?

A. No, sir; don't know what was to be done, but the empty cars I know we were getting out there were not to go in the train. I know those two were not. I don't know that they were to go in the train or not, but don't think they were.

Q. You say this obstruction had been there about a month or more?

A. I think so.

Q. And you knew it had been there at least a month?

A. Yes, sir.

Q. You say you have been working for the railroad company for about eighteen years and are still working for it?

A. Yes, sir.

Redirect examination.

By Mr. Allebach:

Q. Mr. Cato asked you if you had told Mr. Barry when he first went there about this obstruction. Will you please tell the jury what Mr. Barry told you when you instructed him of this obstruction.

Objection by counsel for plaintiff.
Overruled. Exception.

A. I told Mr. Barry the night when we were going under this piece when he first——

Objection to answer by counsel for plaintiff.

94 A. (Continuing:) Mr. Barry told me that I needn't look out for him, that he was an experienced man, and would look out for obstructions himself.

Counsel for plaintiff moves that the answer be stricken out.
Objection overruled by the court.

(Witness excused.)

95 James A. Wintz, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. Allebach:

Q. Give the stenographer your name, please?

A. James A. Wintz.

Q. What was your business April 23, 1911?

A. I was yard foreman on one of the yard crews or conductor.

Q. How long at that time had you been employed by the Kanawha & Michigan Railway Company?

A. Prior to this accident?

Q. Yes.

A. About seventeen years.

Q. Where were you at the time that Mr. Barry was injured?

A. I was on that switch about a car length and a half or two car lengths below the cars.

Q. Why had you gone in there?

A. We had gone in there to pick up two empty K. & M. box cars on that switch.

Q. What did you go into that switch with?

A. With a light engine.

Q. Who made the coupling of the engine with those two light empty cars?

A. Mr. Barry.

Q. Then what did he do?

96 A. He went on top of the cars.

Q. And what did the train do, the two cars and the engine?

A. Just after the engine was coupled on Mr. Englert came out, and was telling me about some cars he wanted. I was in conversation with Mr. George Englert, and after the engine had started, gone probably a car length, maybe two car lengths,—just a short distance—because it was on a very heavy curve, probably 22 degree curve, and I heard a noise, and when I heard the noise I looked up and Mr. Barry was falling and he was between the top of the car and the wheel, probably about half way.

Q. What instructions, if any, concerning the movement of these two cars had you given Mr. Barry prior to this?

A. I told Mr. Barry we had hold of some cars on the main line, we were going up the main line, and I told Mr. Barry, "You cut the engine off and come in on the brewery switch and pick up them two empty cars," and he cut the engine off and went up and backed in on this curve and coupled on the cars and started off.

Q. Where did you instruct Mr. Barry to take these cars?

A. To couple and take them on the main line with the rest of the empty cars.

Q. What obstruction, if any, was at this time over and above the K. & M. spur in to the brewery premises?

A. There was two, I think; there were two by four running from each corner of the temporary office, one from each corner,
97 one from this corner, one from that across to the new building they were putting up, the bottling house, one on each corner.

Q. How long had that been there, Mr. Wintz?

A. I would think they had been there thirty days, probably, might have been a few days—probably might not have been so long.

Q. How long had Mr. Barry been working for the K. & M. and in your crew?

A. I think he did about all the braking he done was for me. I think he commenced about the first of the month, and worked up until the 23rd.

Q. Are you working in daylight, or dark—night?

A. Working in daylight.

Q. This accident happened in daylight or dark?

A. Accident happened in daylight.

Q. What knowledge, if any, do you know that Mr. Barry had of these obstructions over this spur?

A. I notified him about the overhead pieces to be careful and watch out for them.

Q. You say you saw Mr. Barry falling off when between the top of the car and the rail. When had you seen him last prior to this?

A. Prior to the accident?

Q. Yes, sir.

A. Just after he coupled the engine on, going on the curve.

98 Q. What signals, if any, did you give him after you had given him his verbal instructions as to the disposition of these two cars?

A. Didn't give him any in addition, because I had notified him what to do.

Q. How far on each side of this strip which was above the track could you see it?

A. You mean how far from the ground?

A. How far up and down that switch could you see it?

A. Well, I expect about two car lengths each way. It is about 22 degree curve, and I would think it would be probably about maybe two each side of it and two and a half—that is about five car lengths you could see each way—could see the obstruction.

Q. About how many feet is a car length?

A. About thirty-six feet.

Q. Then the range of vision on each side would be approximately seventy-five feet, would it?

A. I expect. It was two and a half car lengths, would be about 84 feet.

Q. How far did these cars move after they started before you saw Mr. Barry fall?

A. I expect they moved about two car lengths.

Q. About how fast were they moving out of there?

A. Just about as fast as a man would walk ordinarily.

99 Cross-examination.

By Mr. Cato:

Q. You say you went in on that switch to pick up two empty K. & M. box cars that day?

A. Yes, sir.

Q. Did you take at the time, or do you know now, the numbers of those box cars?

A. No, sir, I did not take them. Couldn't tell you the numbers of them now.

Q. Is there a method by which you can get those numbers,—are there any records of those numbers?

A. The yard conductor is not required to keep a record of the cars around the yard that way, all of them, switching up empty cars. Don't keep a record.

Q. Would Mr. T. S. Richardson have the number- of those cars in his office?

A. Well, I couldn't tell you.

Q. Should he have them?

Objection.

Mr. King: I can give him those numbers, I think, correctly. (Mr. King gives Mr. Barry the numbers.)

Q. And you are sure that these were two empty K. & M. cars?

A. Yes, sir.

Q. Did you make a written report of this accident, as conductor of the train?

A. This is the report you mean?

100 Q. Yes, sir.

A. Yes, sir.

Q. Would, or did, that report show the number- of these cars?

A. Well, I expect *they* would.

Q. Have you got that report?

A. No, sir; that was turned in to the company. We don't always do it. Often do, but not always. Are not required to do it.

Q. Do you know this gentleman, Mr. T. L. Kerse, by sight?

A. No, sir.

Q. On or about the 21 of November, 1911, at your house didn't you make a statement as to your knowledge of the facts concerning this accident to Mr. T. L. Kerse,—this gentleman here?

A. I believe there was a man came to my house on or about that time, but I wouldn't know if it was him.

Q. Isn't this baldheaded man the man you made it to?

A. Possibly he is.

Q. At that time there was no lawsuit about this, was there?

A. Not that I know of, no, sir.

Q. And you tried to give Mr. Kerse a statement,—or the gentleman who came there—a statement of what you knew about this thing, didn't you?

A. Did exactly what I am doing right now.

101 Q. At that time you tried to give him a true statement of what took place?

A. Yes, sir.

Q. Did you at that time tell this man who came to your house and asked you for this statement that you had notified Barry that this overhead obstruction was on that switch and cautioned him against injury from it?

A. I couldn't tell you that, sir. Don't remember. Might have done it.

Q. You might have done it?

A. Might have done it. Might not. Couldn't say, because that has been two years ago.

Q. Didn't he ask you whether Barry had any knowledge of that obstruction being there then?

Objection.
Overruled.

Q. Didn't you tell this man that you never saw Barry go in there under that projection or stoop under it at any time?

Objection.

A. No, I did not.

Counsel for defendant moves to strike out the last question and answer.
Sustained.

Q. Did you tell this man who came to your house on or about the 21st of November, 1911, and asked you for a statement of this accident that Barry never spoke to you about this overhead projection?

Objection.
Question withdrawn.

102 Q. Didn't you tell this man who got this statement from you at your house that you and Barry never had any conversation at all about this overhead obstruction?

Objection.
Overruled.
Exception.
Mr. Cato: Answer yes or no.
Mr. King: Answer in your own way.

A. I cannot say that I had a conversation with Mr. —— with him, about that particular point, cannot say that I did or didn't.
Mr. King: You mean with Mr. Kerse?
A. Yes, sir; I can't say that I did, because it has been two years ago.

(Mr. Cato:)

Q. You don't deny that you made such a statement to this gentleman?
A. Won't make a statement that I did or didn't, because I——
Q. Now, you have said that you went in there after two K. & M. box cars, and that both of them were empty?
A. Yes, sir.
Q. Didn't you tell this gentleman who got this statement to which I have referred, a statement made at your home about November 21, 1911, that there was only one car on this siding, and that you didn't know whether it was loaded or not?
A. No, sir.
Q. You didn't tell him that?

(No answer.)

103 Q. The usual method, Mr. Wintz, of managing a train such as you were using that day is for the conductor to give signals to the brakeman and the brakeman to transmit those signals to the engineer, isn't that right?

Objected to as immaterial and not relevant.
Objection overruled.
Exception.

A. We sometimes do, and often we just tell them verbally, speak verbally to them to go and do so and so. There is times we do give signals, but no signals given that day, don't think.

Q. When this car, or these cars as you have testified were being moved out of this switch and Barry was hurt, where were you standing with reference to them, back of the cars?

A. Behind the cars.

Q. Behind the cars?

A. Yes, sir.

Q. How far were you from the rear car when the train started out of the switch?

A. I guess something about a car length or little bit more, probably,—just a short distance, you know. We were not standing at all,—walking, Mr. Englert and I were following the cars.

Q. Were you looking in the direction the train was going?

A. No, sir; don't think I was.

Q. Were you walking in the direction the train was going?

104 A. Were walking in the direction the train was going.

Q. And facing, of course, in the direction the train was going?

A. Yes, sir.

Q. Any instructions as to the movement of that train that Barry got on that day he got and accepted from you, didn't he?

A. Yes, sir.

Q. And any signals he got that day in moving that train he got from you, didn't he?

A. No, not necessarily.

Q. But any orders or instructions he got at all would be from you?

A. Yes, sir.

Q. And any signals he got he would get from you as conductor of the train?

A. Yes. Oh, no, not in all cases. Maybe the other brakeman might give signals.

Q. But the other brakeman was out on the main line on this occasion, wasn't he?

A. Yes, sir.

Q. You say there were two of these obstructions across that track?

A. Yes, sir.

Q. Extending from each corner of the temporary office?

A. Yes, sir.

105 Q. When Barry was killed?

A. Yes, sir.

Redirect examination.

By Mr. Allebach:

Q. When Mr. Barry was knocked off that box car, was he looking for a signal from you?

Objection to foregoing question by counsel for plaintiff. Objection sustained by the Court.

Q. What instructions had you given to Mr. Barry concerning the movement of these cars on the side track?

Objection to question by counsel for plaintiff.
Objection sustained by the Court.
Exception.

Q. As a railroad man of nineteen years' experience and as a person who has a thorough knowledge of railroading, what further signals or instructions had Barry any reason to expect from you after you had given him his instructions concerning the movement of these cars?

Objection to question by counsel for plaintiff.
Objection sustained by the Court.
Exception.

Recross-examination.

By Mr. Cato:

Q. After Barry was killed, were those cars that you went in there to get that day pulled out of there by your train?

Objection by counsel for defendant.

106 Q. Were they on that same day, later in that same day, pulled out of that——

Objection by counsel for defendant, which is overruled by the Court.
Exception.

A. I suppose they were. Went in there for them, and I suppose we got them, as far as I remember now they went on out.

(Witness excused.)

107 JOHN C. GRETER, a witness of lawful age, being first duly sworn, testified as follows:

Direct examination.

By Mr. King:

Q. State your name and residence?
A. John C. Greter, Charleston, West Virginia.
Q. Were you acquainted with Thomas P. Barry in his lifetime?
A. I was.

Q. I will ask you if you had any conversation with Mr. Barry—Mr. Thomas P. Barry, relative to his employment?

Question objected to.
Question withdrawn.

Q. Will ask you, Mr. Greter, if you ever had occasion to become acquainted with the signature of Mr. Thomas P. Barry?
A. I did. He applied to me for a position as yard brakeman, and he left his address with me and when I needed——
Q. Will ask you if you would be able to identify that signature if you saw it?
A. Yes, sir.
Q. I hand you this paper, and ask you to tell the jury what it is?

Counsel for plaintiff objects to the paper being identified in this way.

Q. I will ask you, Mr. Greter,—you have testified you were acquainted with his signature,—whether this is Mr. Thomas P.
108 Barry's signature?
A. Yes, sir, I think it is.
Q. I will ask you, also, to say if that is your signature (showing paper to witness)?
A. Yes, sir.
Q. Will you state to the jury what that is?
A. That is an application for employment with the Kanawha & Michigan Railway for position as yard brakeman.
Q. By whom?
A. By Thomas P. Barry.

Mr. King: We would like to offer this in evidence, or else read it in evidence.
Mr. Cato: We object to its introduction in evidence.
Objection overruled.
Exception.
Which paper "Application for Employment" was read to the jury by Mr. King, and offered in evidence, marked "Defendant's Exhibit "A."

Cross-examination.

By Mr. Cato:

Q. Was Mr. Barry employed after this application was made and passed upon favorably?
A. Yes, sir.
Q. How soon after?
A. Why, if it had not been approved, the superintendent would have notified me to take him out of service.
Q. How soon after the application was approved did Mr. Barry enter the service of the company?
109 A. About three or four days. That is, I couldn't just say. I could have used him right after the time that he filled it out. Might have used him at that time. Don't know. Of course

it takes the superintendent three or four days to approve of an application.

Q. Do you know what wages Barry received per day or per hour from the company?

Question objected to by counsel for defendant. Overruled.

A. Why, I don't know just what it was, but I think it was thirty-two cents an hour, if I am not mistaken.

(Witness excused.)

Mr. King: I think that is all, Your Honor, except we want to read some depositions.

Plaintiff moves to suppress the depositions of Ella Amelia Barry, James C. Russel, the deposition of A. E. King, Cleveland, Ohio, the deposition of S. R. Barr, and deposition of Myrtle Weigley, for the following reasons: first, because sufficient notice was not given as to the time, place, and names of the parties whose depositions were to be taken; second, that the depositions are absolutely irrelevant and immaterial, and can throw no light upon the issues involved in the case.

Plaintiff further objects to the admission of the deposition of Ella Amelia Barry on the ground of being irrelevant and 110 immaterial, and because there is nothing in the deposition involved in the issue, the question being as to whether or not the plaintiff, John Thomas Barry, was dependent upon his father for support, and the subsequent marriage of said Barry, if there was such, cannot possibly throw any light upon the issues involved.

Which objection is overruled, and exception noted.

Whereupon the deposition of A. E. King was read by Mr. King, also deposition of S. R. Barr.

Counsel for plaintiff move to strike out all that part of the deposition of Mr. Barr as to the contents of the application, the application being in evidence and speaking for itself.

Depositions of Ella Amelia Barry and James C. Russell were read to the jury by Mr. Allebach.

Counsel for plaintiff move to strike out the deposition of James C. Russell and the depositions of Ella Amelia Barry, and move the Court to instruct the jury not to consider either of those depositions, which motion was overruled by the Court.

The deposition of Mrs. Myrtle Weighley was then read to the jury by Mr. King.

Counsel for plaintiff move the Court to strike out the deposition of Mrs. Weighley, and instruct the jury not to consider it. Overruled by the Court.

The deposition of Mrs. Helen Sarah Taylor was read to the jury by Mr. King, also deposition of James Stafford Taylor and deposition of Mrs. Jennie Sutton.

111 T. L. **Kerse** recalled.

By Mr. Cato:

Q. Mr. Kerse, do you know Captain James W. Wintz who was a witness on the stand for the defendant?

A. I do.

Q. Did you ever go to his house on or about November 21, 1911, to get a statement from him as to what he knew about this accident?

A. I did.

Q. Did he, or not, in that conversation with you, tell you that he never saw Thomas P. Barry stoop under this projection across the switch track at any time?

Question objected to as improper. Sustained by the Court.

It is agreed between counsel for plaintiff and defendant that the paper marked "Kanawha & Michigan Railway Company, Charleston, W. Va., 5/23/13" directed to W. N. King, General Attorney, is the statement of the witness, T. S. Richardson as to what cars were placed on and taken from the Kanawha Brewing Company siding from April 16, 1911, to April 22, inclusive, and that such letter may be introduced in evidence and marked "Plaintiff's Exhibit Richardson No. 1."

112 State of West Virginia,
*Kanawha County, to wit:*

I Nella Lorberg, Deputy Court Reporter of the Circuit Court of Kanawha County, West Virginia, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had and the evidence adduced on the trial of the case of T. L. Kerse, Administrator of the Estate of Thomas P. Barry vs. Kanawha & Michigan Railway Company, in the Circuit Court of Kanawha County, West Virginia, as reported by me in shorthand.

Given under my hand this fourteenth day of August, nineteen hundred and thirteen.

NELLA LORBERG,
*Deputy Court Reporter.*

113 (Def't's Ex. "A," Kerse v. K. & M. R. R.)

Kanawha & Michigan Railway Co.

*Application for Employment.*

Charleston, W. Va., Mar. 31st, 1911.

To H. E. Rittenhouse, Trainmaster:

I hereby apply for a situation as Brakeman, and if accepted agree to faithfully study and obey all rules, regulations and instructions, and to perform my duties to the best of my ability; to maintain strict integrity of character, to pay all my bills promptly each month; to abstain from the use of intoxicating liquors; to avoid saloons or other places where liquor is sold, and will give 10 days' notice in case of leaving service.

1. Full Name and residence.

Thomas P. Barry.

2. Born (City or town—Washington, *State of* D. C., Month October. Day 26, 1874.

3. Height, weight, color of hair, color of eyes.

Height 5 ft. 9¾ in. Weight 160 lbs. Color of hair Black. Color of eyes Brown.

4. Married or single. Single.
Wife's Name ——.
Residence ——.
Number of children ——.
Age of oldest child ——.
Name of oldest child——.

5. Health.
*a.* General condition Excellent.
*b.* Physical defects, if any, none.
*c.* Eyesight and hearing, good or defective, none.
If defective, give particulars, none.

6. Parents, if living.
Name of father, John Barry.
Residence, Williamsport, Md.
Name of mother, Mary Barry.
Residence, Williamsport, Md.

7. Nearest relatives, other than parents.

Name. Residence.
John R. Barry, 411 Preston St. Balto. Md.
Margaret Barry, 1339 T Tea St. Wash. D. C.

114 8. Four responsible persons who will vouch for my character.

Name. Residence.
J. Monahan Dugan, Merchants & Mech. Bank, Wash. D. C.
H. H. Butler, 940 Louisiana Ave. Wash. D. C.
L. C. Summers, Popp Bldg. Charleston, W. Va.
Thos. Conlon, Brooks & Baines Sts. " "

9. If insured, what companies or organizations.

Name Brotherhood Railroad Trainmen. Life insured for $1350.00.

10. Occupation and continuous record five years before date of this application, and names of employers.

From Jan. 1904 to May 1907 with B. & O. R. R. as Brakeman & Cond'r.

Employer, J. Neland Gym. Address, Cumberland, Mr.

From June 1907 to May 1909 with McK. Connecti*ng*, Brakeman.

Employer, Andrew Conley, Address, McKeesport, Pa.

From June, 1909 to Nov. 1909, with Nap. Hill as Auto repairman.

Employer, Napoleon Hill, Address 1905 14 st. Wash D. C.

From Dec. 1909 to July 1910 with N. Y. Light Co. as Light inspector.

Employer C. H. Reilley, Address, 9th & Evart St. Wash. D. C.

From Oct. 1910 to Jan. 1910 with Kan. Aut. Co. Repairman.

Employer, L. C. Summers, Address, Charleston, W. Va.

Was last employed in railway service.

By A. Conly, R. R. from June 1907 to May, 1909; cause of leaving was at instance of relatives to stay East after death of mother.

11. Were you ever employed by this Company? If so, when, where, and in what capacity?

No.

12. Were you ever discharged from the service of this Company? If so, for what cause, and when?

No.

13. Were you ever engaged in a strike? If so, give circumstances and date.

No.

Pending investigation of my record and the acceptance of my services as a regular employe, I fully understand that my position with your company is temporary.

THOMAS P. BARRY.

Witness:

J. G. GIETER.

115 No. 782. The Kanawha & Michigan Railway Co. Record of applicant. Thos. P. Barry. Residence, ——. Occupation, Yard Brakeman. Date M'ch 31st, 1911. Approved, A. N. Lyon,, Supt. 4/14 1911.

### *Medical Examiner's Certificate.*

Full Name of person examined Thomas P. Barry.

In figure, Erect; Color, White. Measure around chest under forced expiration (in inches) 33.

Measure around chest under full inspiration 37½.

General appearance, healthy or not, Healthy.

Are there any malformations? No.

Has he suffered the loss of any member or part member of the body? No.

State the rate of pulse 80. Does it intermit. No. (Examined by auscul-ation and percussion.) Can you detect any disease of the heart? No. If so, what is the nature? ——.

Is there any disease of the blood vessels? No. Is there any indication of lung disease? No. Is there any indication of
116 disease of the nervous system? No. Has he rupture? No. If so, what form? ——.

Do you believe the applicant to be temperate? Yes.

Sight.

Left Eye—Acuteness of vision 20/20 (Normal).
Color sense Normal.
Right Eye—Acuteness of vision 20/20 (Normal).
Color sense Normal.

Hearing.

Left ear—Watch 8 to 10 feet.
Conversation, Normal.
Right ear—Watch 8 to 10 ft.
Conversation, Normal.

Is there anything further in connection with the applicant that would be a benefit to the company to know? ——.

I certify that I have this day carefully examined the above named applicant, and do advise his acceptance as an employe.

3/31 1911.

W. A. McMILLAN,
*Medical Examiner.*

THOS. P. BARRY.

Witness:
B. ADAMS.

117 PL'F EX. "RICHARDSON NO. 1."

Copy.

CHARLESTON, W. VA., 5-23-13.

Mr. W. N. King, General Attorney, City.

DEAR SIR: Referring to our phone conversation of a few days ago requesting check of the Kanawha Brewing Company's siding from April 16th, 1911 to April 22nd, inclusive.

April 16th, Sunday, no record taken of cars on their siding.
April 17th P. R. R. 8146, empty cases from Pittsburg.
April 17th P. R. R. 102419, empty car placed for loading.
April 18 P. R. R. 8146, empty car unloaded by the Brewery.
April 18th C. A. & C. 10963, brick from the C. & O. Ry.
April 19th C. A. & C. 10963, brick from the C. & O. Ry.
April 20 K. & M. 1328, brick from West Charleston.
April 20 K. & M. 1136, brick from West Charleston.
April 20 C. A. & C. 10963, as shown above.
April 21st K. & M. 1328, as shown above.
April 21st K. & M. 1136, as shown above.
April 21st, C. A. & C. 10963, empty car unloaded by the Brewery.
April 22nd, K. & M. 1328, as shown above.
April 22nd, K. & M., 1136, as shown above.

Our record shows the above cars handled from this siding as follows:

P. R. R. 8146 reloaded with beer from Booker, W. Va.
118 · P. R. R. 102419 loaded with beer April 18th fro- Smithers.
C. A. & C. 10963 returned to the C. & O. empty for home on April 21st.

K. & M. 1328 and K. & M. 1136 taken to West Charleston for reloading on April 22nd.

The top part of my statement gives you a complete daily consist of this siding and the forwarding record shows you the disposition of each car that had been on the Brewery's siding.

Yours truly,

T. S. RICHARDSON, *Agent.*

119 In the Circuit Court of Kanawha County, West Virginia.

T. L. KERSE, Administrator of the Estate of Thomas P. Berry, Deceased,

vs.

THE KANAWHA & MICHIGAN RAILWAY CO.

Depositions of witnesses taken on behalf of the defendant on the 28th day of April, 1913, at the office of Warren M. Mitchell, Room 104 Columbian Law Building, Washington, D. C., between the hours of 9 a. m. and 6 p. m. on that date, pursuant to the attached notice.

Present: On behalf of the Plaintiff, George A. Berry, Esquire.

Present: On behalf of the Defendant, W. N. King and Leroy Allebach, Esquire.

Thereupon: Mrs. HELEN SARAH TAYLOR, who being first duly sworn deposes and testifies as follows:

Direct examination.

By Mr. Allebach:

Q. Give your name and place of residence?

A. Mrs. Sarah Helen Taylor, 910 7th St., S. E. I was born on the first day of January, 1859.

Q. Are you the mother of Maude Taylor who married Thomas P. Berry?

A. Yes, sir.

120 Q. When were they married?

A. That is something I do not remember.

Q. How long ago?

A. It has been about 20 years, I think.

Q. Where were they married?

A. In Baltimore.

Q. Where did they live after they were married?

A. They stayed, I guess, a couple of weeks at my house and then from there he taken her to his home in Williamsport.

Q. Williamsport, Pennsylvania?

A. Maryland.

Q. How long did they live together as husband and wife?

A. That I do not remember.

Q. About how long?

A. About five or six weeks, I guess.

Q. How many children did they have?

A. One.

Q. You say they lived together about five years?

A. Yes, sir.

Q. After their separation where did Mrs. Berry, your daughter, go?

A. She come home with me.

Q. What did she do after leaving Mr. Berry and living with you, for her own maintenance?

A. She did not do anything but stayed at our house, at home.

Q. Who kept her?

A. Well, we taken care of her.

121 Q. Who bought her her clothes and gave her her food?

A. She used to get letters from Thomas and a few days after she would get the letters she would go out and buy herself and the child some clothes, but I never read the letters; I never inquired whether she got it from him or no. But I do remember of him writing to her.

Q. How long ago was that?

A. How long ago? That has been about ten years, I guess.

Q. Do you know of her receiving letters from him within the past ten years?

A. They Went away from me then. They moved away and they was away quite a while and I do not know whether she received any letters or no after she left me.

Q. Where did she go when she left you?

A. She moved out in the country. What is the name of the place? At Oxen Hill, I think they call it.

Q. Near Washington?

A. Yes, sir; not far from Washington.

Q. How long did she stay at your house after leaving Mr. Berry?

A. I could not answer that.

Q. About how long?

A. Well she was not never away a great while. She would always go and come. She never stayed away for good.

Q. After leaving Mr. Berry did she ever marry again?

A. Yes, sir.

Q. Whom did she marry?

A. William Hess.

Q. Where did she marry Mr. Hess.

122 A. She married him here in Washington.

Q. How long ago is it since she married Hess.

A. I guess it has been nearly ten years.

Q. Did she have any children by Mr. Hess?

A. Yes, sir.

Q. How many?
A. Two.

Mr. Berry: I want to object to this line of inquiry because of the fact that it does not appear how it is relevant, the only inquiry being as to the dependency of Thomas P. Berry and the marriage of the wife of Mr. Berry and the number of children she had by Mr. Hess, which cannot in any way affect the issue involved.

Q. After the time she married Mr. Hess what letters, if any, do you know of her receiving from Thomas P. Berry?
A. Well, sir, I do not remember about the letters after she went away, but I know she told me that she had letters from Thomas.
Q. Do you know positively of her getting any letters during that time?
A. When she was at my house I know that she did.
Q. During the last ten years?
A. Well, I do not know about the last ten years. I only taken her word for that. She told me that she had a letter from Thomas. She told me that.
Q. When your daughter left Mr. Berry, what disposition did she make of the child.
A. She did not make any.
123 Q. Who took care of the child after her leaving Mr. Berry?
A. We taken care of it, but I think Thomas clothed her and the child.
Q. Do you know that Mr. Berry clothed the child and herself?
A. She got the money from Thomas. He sent the money in a letter and I know she did not have any money at all until she would get a letter. Then in two or three days she used to go out and buy herself and child some clothes. That is all I know.
Q. How often did these letters come?
A. Well, I do not remember how often.
Q. How much did he send at each time?
A. I never knew that. She always seemed troubled and I never worried her by inquiring of her business at all.
Q. Did you ever open any letters for her?
A. No, sir; I never.
Q. When your daughter married Mr. Hess, what did she do with her boy?
A. With her boy? She was mostly at our house, home. Of course he was there with her.
Q. Who took care of the boy then?
A. We taken care of him, but we did not clothe him nor clothe her, because she would have money and very often she used to buy things that I could not very well.
Q. During this time she was living with Mr. Hess, was she not?
A. Yes, sir.
Q. What was this boy's name whom your daughter had by Thomas P. Berry?
124 A. John Thomas Berry. He was na*mde* after his uncle.
Q. What is he doing now?

A. I don't know where he is at. You mean John?

Q. Yes.

A. He is here in the city.

Q. How is he employed?

A. He is not doing anything at present. To tell you the truth he is hardly able to work. He is in very bad health.

Q. Has he in the last few years been employed at any sort of labor?

A. The last that I know of him doing was working on a building at Providence Hospital, learning carpentering.

Q. What had he done before that?

A. I was just trying to think. He had a place and he had to give it up. I was trying to think where it was at, on account of his health was very bad.

Q. Has he been employed at any time by any railroads.

A. And there is where he had to give it up. He was in such bad health he had to give it up.

Q. How long had he been working there?

A. I guess a couple of months, that is how long.

Q. Had he done anything before that for anyone?

A. I cannot remember whether he did or not. If he did, I do not remember.

Q. Who has been supporting him while he was not working?

A. Well, he was at our house the best part of the time.

Q. Who provided for him there?

125 A. Of course me and my husband did.

Q. How long had he been living at your house and been supported by your husband?

A. And then he—well, ever since he left the father and since he come away, you know. Ever since she brought him to our house. Well, he has not been away from there altogether over two years.

Cross-examination.

By Mr. Berry:

Q. I understand you to testify that John is now in very poor health?

A. Yes, sir.

Q. Is he able to work?

A. He might do a little work, something light, but he is in very poor health.

Q. Has he been under the care of the doctor, to your knowledge, during the past two or three years?

A. Yes, sir; he has been under the care of the Doctor.

Q. Do your know whether or not John received any money from the Brotherhood of Locomotive Trainmen on the death of his father?

A. Why, yes; didn't he.

Q. Is it not further a fact that he has been using this money in payment of doctor's bills?

A. Oh, yes.

Q. And hasn't he been supporting himself with that money since his father died?

A. Yes, sir.

126 Q. You have not, from the time of his father's death been contributing anything for his support?

A. No; I did not think about that.

Q. You say John left the hospital. Why did he leave Providence Hospital?

A. Because that was very light work and he was just learning the trade, like the place was finished, it was a nursery, when that was finished he was out of work again.

Q. Was that the first time he ever attempted to learn the carpentering trade?

A. Yes.

Q. Why did he leave the railroad company?

A. On account of his health; he said he could not stand it.

Q. Is it not a fact his health was in such condition he could not stand it.

A. He could not stand it.

Q. You testified that during the greater part of John's life he lived with you and you took care of him?

A. Yes, sir.

Q. Do you mean you bought him clothes or simply gave him something to eat and a place to sleep?

A. No; we never gave him clothes because his mother always had a little money Thomas sent her and of course he would have a little change too and he clothed her, I guess and the child.

Q. You never contributed anything towards his clothes?

A. No, sir; I never bought him a piece of clothes.

Q. How did he dress in comparison with the other boys in the neighborhood?

127 A. He always had nice clothes.

Q. What can you say about spending change?

A. He used often to have change himself.

Q. Did he dress as well or better than the average children in that neighborhood?

A. Well, just as good, if not better. Of course he dressed better than some of them.

Q. How long did John go to school.

A. How long did he go to school? Six years, I think.

Q. Do you know what grade he was in when he left?

A. I think it was the sixth grade.

Q. Who bought his books and clothing up to that time?

A. I don't know who bought his books.

Q. You do not?

A. I do not; no, sir.

Q. Do you remember the occasion upon which your daughter married Mr. Hess? You remember that, do you not?

A. Oh, yes. I remember it.

Q. Did Mr. Hess, to your knowledge, ever contribute anything to the support of John Berry?

A. Not to John or his wife either.

Q. In other words, he neither supported Mrs. Berry or John?
A. No.
Q. Who did that?
A. We done it ourselves.

Q. You mean you supported Mrs. Berry?

128 A. Yes, sir. He would not work.

Q. You never supported John, did you, except to give him something to eat and a place to sleep.

A. Give him his board and a room, but I never clothed him or his mother.

Q. Did you give him board or room or in any way assist in his maintenance from the time of the death of his father.

A. No; not since the death of his father.

Q. Where did he get the money for that purpose, if you know?

A. Well, for his board he would draw the money from the Brotherhood.

Redirect-examination.

By Mr. Allebach:

Q. Did Thomas P. Barry know that your daughter had married Mr. Hess?

Mr. Berry: I object to the question as it — not re-direct examination and it has no bearing on this case at all?

A. Yes, sir.

Q. Did he continue to support your daughter after her marriage to Mr. Hess?

Mr. Berry: I object to that on the ground that it is absolutely irrelevant, the issue in this case being at this time whether or not Thomas P. Berry, deceased, contributed to the support of his child. John Thomas Berry?

A. I know this, that she told me that she had got letters from Thomas and I know that he was on to see her and they lived there at Oxen Hill and he went out there to see her.

129 Mr. Berry: This all goes in subject to the objection that it is not re-direct examination.

Q. Do you have personal knowledge that John Berry has received money from the Court or from the Brotherhood of Railroad Trainmen?

A. Yes, sir; I know that he did from his guardian, quite often.

Q. How do you know that he got it?

A. I know he did because he always come by and told me that he had to draw money to pay his board.

Q. Did you ever see the guardian pay him anything yourself?

A. No; I did not see it, but I know it very well.

Mr. Berry: If there is any doubt of that at this time we will have Mr. Downing produce the checks, if you have any doubt about it.

Mr. Allebach: The defendant objects to the remarks of Mr. Berry in regard to the possibility of proof. These checks have in reality been paid by the guardian of John Berry?

And further this deponent sayeth not.

SARAH HELEN TAYLOR,
By WARREN M. MITCHELL,
*Notary Public, D. C.*

And thereupon came James Stafford Taylor, who being first duly sworn, deposes and says.

Direct examination.

By Mr. King:

Q. Are you the father of Maude Taylor?

A. I am the father of Maude May Taylor.

Q. Do you remember about how long ago she was married to Thomas P. Berry?

130 A. I could not give you the day and date.

Q. Well, about when.

A. She was married to him about twenty years ago, or a little over, I think.

Q. Where?

A. She was married in Baltimore in the Cardinal's residence. I went to her marriage.

Q. Where did they live after they were married?

A. Where did he live.

Q. They live, yes.

A. Williamsport, Maryland. I lived in Washington and she and her husband went to Williamsport as soon as they got married and lived there.

Q. How long did they live together?

A. In Williamsport? Probably about three years, to the best of my knowledge. I guess about three years.

Q. Then where did your daughter go?

A. She came home and stayed a while.

Q. Did they have any children by that marriage?

A. Had one, John Thomas Berry, that is the first child she had and the only one she had by him.

Q. Where did he go after they separated.

A. He remained in Williamsport, so far as I know.

Q. I am speaking of John, the son?

A. When he came home?

Q. Yes.

A. She brought the boy with her.

131 Q. How long did she live at your house after that time?

A. Now I could not tell you exactly how long she lived there, probably a couple of years.

Q. Then where did she go?

A. She went to house-keeping, to herself. She left my house and I suppose she went to house-keeping.

Q. Do you know where she went to house-keeping?
A. No.
Q. In what city? Do you know?
A. In what city? In Washington.
Q. Was that after she married Mr. Hess?
A. Oh, no. She left before she married Mr. Hess.
Q. Did she take John Thomas Berry with her?
A. Took him every where she went.
Q. How long ago was it that she was married to Mr. Hess?
A. Now that is something I could not tell you. I do not know how long she has been married to Mr. Hess.
Q. About how long ago?
A. I do not know that.
Q. How old is the oldest child by Mr. Hess?
A. I think he is going on about 12 years old.

Mr. Berry: Counsel for the plaintiff objects to this line of cross-examination on the ground that it is absolutely irrelevant and immaterial as to when she married Mr. Hess and the number of children she had by Mr. Hess. That has no bearing on the case at all.

Q. How old is John Thomas Berry? Do you know, Mr. Taylor?
A. He was born on the 24th day of February 1894.
132 Q. So that in 1913 he is 19 years old?
A. Yes, sir; he is going on 20 now.
Q. Where is John Thomas Berry now?
A. He lives down southwest.
Q. Do you know what he is doing?
A. No, sir; I do not.
Q. Do you know whether John has been working in the past?
A. Yes, sir; he was working up at Providence Hospital about a month ago.
Q. What was he doing up there?
A. Working with a carpenter out there.
Q. What had he done prior to working at the carpenter work?
A. Providence Hospital digging ditches up there at $1.25 a day, the foundation of a building.
Q. Prior to that time what had he been doing?
A. I could not tell you: I do not know.
Q. Do you recall that he worked for one of the railroads?
A. Oh, yes, I can tell you about that, because he was working on the Washington Terminal Railroad cleaning cars prior to that time.
Q. How long did he work there, if you know?
A. About six or seven months. He quit on account of his health.
Q. Do you know what he had done prior to that, if anything?
A. Oh, he worked several places up there. He worked for a lithographer. He worked several places.

133 Q. Where was he living during the time he was working for the railroad and for the Providence Hospital?
A. Boarding down southeast. What is that man's name, Mrs. Taylor. He boards down there at Mr. Paxton's on First street,

or Third street, southeast, and has been boarding down there, I believe, for a couple of years.

Q. Has John lived at your house some?

A. He has lived at my house some, maybe two or three months and then go somewhere else and board and then come back again.

Q. When he was living at your house who paid his board?

A. He was a child when he was living at my house. There was nobody paying his board. He was only a child then.

Q. I want to get it from the time he was a child up to the present time?

A. He has never lived at my house since he has been a grown man. He has not lived in my house for four or five years. He was only a child when he was at my house and I treated him like he was one of my own children. His mother bought his clothes. Where she got the money from I could not say. She got letters several times. Where she got them from I do not know. It might have been from Thomas. She bought him clothes and bought him shoes.

Q. Up to this time, four or five years ago, when he stopped living at your house, who paid his board?

A. She would, his mother. I do not know where she got the money from. She used to get letters from her husband. She always used to have good clothes. The first letter from her husband

Mr. Berry—she never showed them to me——

134 Q. You said while he was living with you you treated him as one of your own?

A. I did. I did not get any board from him, but his clothes, I never bought him any clothes in my life. His mother bought his clothes.

Q. But you did board him and give him a place to sleep. Is that right?

A. When he was a child; yes.

Q. Until he was how old?

A. I could not tell you that to save my life.

Cross-examination.

By Mr. Berry:

Q. Mr. Taylor, how long did John work at the Washington Terminal Railroad Company?

A. I think about seven or eight months, probably nine.

Q. Why did he leave there?

A. Because it was not good work for his health, climbing up and down the ladder in the dust and dirt.

Q. Is he in good or bad health?

A. Bad health.

Q. Do you know whether or not he has been under the care of a physician for the last two years?

A. He told me he had. He has come by my house and had medicine and prescriptions and one day he had something he put down his throat, a little piece of lead on a string. He said he had hemor-hage or something—I do not know what it was.

135 Q. Do you know whether or not he had hemorrhages?

A. He said he had hemorrhages.

Q. Do you know from what part of the body.

A. No; I do not know; he did not tell me that.

Q. Do you know whether it has been necessary for him to go away for his health in the past year or two?

A. That is what he told me, he has to go for his health.

Q. Do you know where he went?

A. He went up in Virginia, up at Bluemont, I think it was.

Q. Do you know whether or not he went anywhere else after coming back from Bluemont?

A. I could not say. He might have went somewhere else. I do not know.

Q. Why did he leave his position at Providence Hospital?

A. Why did he leave there?

Q. Yes.

A. Because he was working at carpentering and they put him to digging ditches and he was not able to stand it.

Q. How long was he at that?

A. About two days.

Q. Is he a boy of robust health?

A. No, sir; he is frail.

Q. What is his physique, that of a robust boy. Is he robustly built, or how?

A. No, he is delicate.

Q. How much work has he done within the past two years?

A. I don't think in the past two years he has done a year's work—not over.

136 Q. Do you know whether he received any money, and if so, from what sources, on the death of his father?

A. You mean insurance money?

Q. Do you know whether he received any money, of your own knowledge?

A. Only what he told me.

Q. You spoke of supporting John during the time that he lived at your house. Do you mean by that that you bought him clothes, furnished him medicine, ticket money and such things as that?

A. No, sir; I only give him something to eat and a bed to sleep in.

Q. You contributed nothing toward his clothes?

A. No, sir.

Q. Nor any other expense outside of what you have enumerated?

A. No, sir. Only something to eat and a bed to sleep in.

Q. Who clothed him?

A. His mother.

Q. Do you remember the occasion upon which your daughter was married to Mr. Hess, your daughter subsequently married Mr. Hess?

A. Yes, sir.

Q. Where did she live at that time?
A. When she married Mr. Hess?
Q. Yes.
A. She lived over northeast.
Q. Did she ever live with you?
A. She was not living with me when she married him.
Q. After she married Mr. Hess did she ever live with you?
137 A. Yes, sir.
Q. For how long?
A. Several times. One time about six months and I guess another time about three months.
Q. Do you know whether or not Mr. Hess supported her?
A. No, sir; he did not support her.
Q. Do you know whether or not he supported John?
A. No, sir; he did not support John.
Q. Did you support John during the time Mrs. Hess lived with you?
A. Fed him part of the time. Part of the time I did not.
Q. You did not buy him any clothes or medicine or anything of that kind?
A. No, sir.

And further this deponent sayeth not.

JAMES STAFFORD TAYLOR,
By WARREN M. MITCHELL,
*Notary Public, D. C.*

And thereupon came Mrs. JENNIE SUTTON, who being first duly sworn, deposes and says:

Direct examination.

By Mr. King:

Q. Mrs. Sutton, where do you reside?
A. 909 I St., N. W.
Q. I will ask you if you were acquainted with Thomas P. Berry?
A. Yes, sir; I was very well acquainted with him. He lived between four and five years in my house.
Q. Where were you living at that time?
138 A. At Cumberland, Maryland. Then he was with me a short time in McKeesport, Pennsylvania.
Q. I will ask you if at any time while he was there he indicated to you that he had a wife?
A. Never. I said to Mr. McDonald one time——

Mr. Berry: I object to that.

Q. Just answer the question.
A. He never intimated to me that he had a wife.
Q. Did you know Miss Wright of Cumberland?
A. Yes; I knew of her intimately.
Q. Do you know, Mrs. Sutton, anything of the relation that existed between Mr. Thomas P. Berry and Miss Wright?

Mr. Berry: I object to that as it is absolutely irrelevant and immaterial.

A. Yes. They were engaged to be married. At least that is what everyone said.

Mr. Berry: I object to that and move to strike it out as purely hearsay.

A. Yes. It is purely hearsay. They told me so.

Q. I will ask you if you remember a time when Thomas P. Berry was injured in the B. & O. yard?

A. Yes, sir; I remember that very distincty and I recall the year it happened, while I was in the hotel, he was boarding at that time and he was hurt very bad.

Q. After he was hurt and at your hotel, will you tell me who he asked for?

139 Mr. Berry: I object to that and this line of inquiry, it being absolutely irrelevant and immaterial and can throw no light on the issues in this case.

A. He asked for Miss Wright to be sent for and we sent for her.

Q. Did she come?

A. Yes, sir; she came, she and her married sister.

Mr. Berry: This all goes in under the objection.

Q. While Mr. Berry boarded with you did he ever indicate that he had a child in Washington?

A. Never. Never.

Mr. Berry: I object to that.

Q. Or a child anywhere?

A. Anywhere a child? Never.

Cross-examination.

By Mr. Berry:

Q. You say Mr. Berry never indicated to you that he had a wife and child?

A. No, sir; never.

Q. You never discussed that proposition with him.

A. No, sir.

Q. There was no reason why he should have indicated it to you?

A. No. Only once it was said he was going to get married and Mr. McDonald said——

Q. As a matter of fact, he never discussed it with you one way or the other?

A. No, sir.

Q. Why did you say he never indicated it to you?

A. He never did. Mr. McDonald told me he was a married man.

140 Mr. Berry: I object to what Mr. McDonald told her?

A. (Continuing:) Mr. Berry never said anything to me about it and I never said anything to him about it. It was none of my business.

Q. You had no interest in him at all?

A. Nothing more than a boarder. He paid his board. He was a good boarder and that is as far as I was concerned.

Q. Do you know what he did on the railroad?

A. I don't know anything about that. He carried $1500 insurance, I think, while he worked there in the yard. He was a yard barkeman.

Q. Do you know what became of that insurance.

A. Yes; it was paid to the trustees for his son, that is, here in Washington.

Q. How do you know that?

A. Well, I was told that by the man, one of the Brotherhood men of Cumberland, he was one of the officials of the Brotherhood and we were very intimate and he told me—I asked him in particular if his wife in Cumberland had got the insurance—she goes by the name of Berry——

Mr. Berry: I move to strike out the testimony that he had a wife in Cumberland.

A. (Continuing:) I could not tell you about that. I know I have seen a dozen times in the paper where Mrs. Berry had been in Cumberland.

Q. Then why did you say Miss Wright.

A. She is the lady I am speaking of. She claimed they were married in June, seven years ago.

141 Q. And that is purely hearsay?

A. That is pure hearsay. They lived there together at the hotel; I know that.

Mr. Berry: I move to strike that out.

A. (Continuing:) Well, it may be hearsay. Of course I don't know anything about it.

Q. It is, as a matter of fact?

A. Yes; it is hearsay. I never seen them married. Mr. Collins told me about the money.

Redirect examination.

By Mr. King:

Q. Do you know where they did live together?

A. Yes, they lived together. Yes; I know that. I am positive of that.

Recross-examination.

By Mr. Berry:

Q. Lived together in your house?

A. No; not in my house, but lived together with intimate friends of ours. I know that they did live together.

Q. How long did Mr. Berry live in Cumberland?

A. He was more than five years there. He was more than five years with me.

Q. When did he come there the first time?

A. I think about 1902 as near as I can remember, and left my house in 1906, the latter part of 1906.

Q. You say he lived togehter with this woman as husband and wife? Seven years?

142 A. No. We left Cumberland and they went into another boarding house out on the hill?

Q. Who went?

A. Mr. Berry and this Miss Wright, his wife.

Q. You do not know anything about what Mr. Berry did and where he lived during the time you left Cumberland?

A. No, sir.

Mr. Berry: I move to strike that out as hearsay.

And further this deponent sayeth not.

JENNIE SUTTON,
By WARREN M. MITCHELL,
*Notary Public.*

In the Circuit Court of Kanawha County, West Virginia.

T. L. Kerse, Administrator of the Estate of Thomas P. Berry,
Deceased,
vs.
The Kanawha & Michigan Railway Co.

Depositions of witness taken on behalf of the plaintiff on the 28th day of April, 1913, at the office of Warren M. Mitchell, Room 104 Columbian Law Building, Washington, D. C., between the hours of 9 A. M. and 6 P. M. on that date, the usual notice being waived, counsel for the defendant consenting that the witness' testimony may be taken at this time as a witness on behalf of the plaintiff.

And thereupon came R. F. Downing, who, being first duly sworn, deposes and says:

Direct examination.

143 By Mr. Berry:

Q. Are you a member of the bar of the District of Columbia?

A. Yes.

Q. And have been for how long?

A. About twenty years.

Q. Are you the legally appointed guardian of John Thomas Berry, deceased?

A. I am.

Q. I mean of John Thomas Berry?

A. Yes; I am.

Q. Is he the infant son of Thomas P. Berry, deceased?

A. I understand that he is; yes.

Q. I wish you would look at your records, if you have them with you and tell us how much money and from what sources you received it, as the guardian of John Thomas Berry?

A. March 5, 1912, I received from the prior Guardian $419.75. On March 25th, I got a rebate on the prior Guardian's bond, $5. On August 25th, 1912, I got $34.05, which was balance due from the estate of Thomas P. Berry, as per accounts filed in the administration cause.

Q. Were you the legal a-ministrator of Thomas P. Berry?

A. Yes; I was.

Q. Did you receive any money as administrator from the estate of said Berry?

A. Yes.

Q. And from what source?

A. I got some money from insurance and also salary.

144 Q. Do you remember the amount of that?

A. Not now. I could not tell you. Something like $1300. $50 was the salary.

Q. What was done with that money?

A. It was disbursed in the administration cause.

Q. Have you been making any disbursements in your capacity as guardian on account of the guardianship of John Thomas Berry?

A. Yes, sir.

Q. What are those disbursements for?

A. Mostly for board and maintenance of the ward and several little items of travelling expenses.

Q. Did you make any disbursements on account of sickness?

A. Yes. I paid several bills on account of sickness.

Q. Were there any disbursements made on account of advances covering the transportation of your ward to other parts of the country?

A. Yes, sir; I paid his expenses down to Bluemont.

Q. What was the necessity of his going to Bluemont?

A. He had malarial fever and at the advice of the doctor I did that twice and I paid his expenses to Rockville once for the same reason and at the advice of his physician.

Q. Do you know the state of health of your ward?

A. Pretty bad. He suffers very much from malarial fever and is generally rather delicate.

Q. Would you consider him a boy of strong or weak physique?

A. I said he was a man of delicate physique.

145 Q. Were all those disbursements made under order of the Court?

A. Not all of them, but practically all of them. Some small items that I did not take any trouble in getting an order of the Court for.

Q. Can you state approximately the amount of money you have expended in his behalf from the time you were appointed guardian?

A. $298.

Q. And that is to cover the items you have enumerated?
A. I have on hand now a balance of $178.09.

Cross-examination.

By Mr. King:

Q. During what period of time have you paid the amount about which you have testified?
A. As guardian, you mean?
**Q. Yes.**
A. I was appointed guardian on the 25th day of January, 1912 and the disbursements made were made March 6, 1912, which seems to be the first, according to my book, and the last disbursement was April 15th, 1913.

And further this deponent sayeth not.

R. F. DOWNING,
By WARREN M. MITCHELL,
*Notary Public, D. C.*

By agreement of counsel for the plaintiff and counsel for the defendant it is stipulated that the depositions may be used without the signatures of the witnesses whose depositions they purport to be, and counsel for the defendant and counsel for the plaintiff
146 waive any objections which might be made, based upon the lack of such signatures. Counsel for the plaintiff and counsel for the defendant further waive any objection to any form of caption or of certificate in the taking of these depositions.

District of Columbia, *ss:*

I, Warren M. Mitchell, a Notary Public in and for the District of Columbia do certify that the aforesaid depositions of Mrs. Sarah Helen Taylor, James Stafford Taylor, Mrs. Jennie Sutton and R. F. Downing were duly taken by me at the time and place stated in the caption hereof and that the signatures of said witnesses were waived by agreement of counsel.

Given under my hand and seal this 30th day of April, 1913.

WARREN M. MITCHELL,
*Notary Public, D. C.*

## *Notice to Take Depositions.*

To T. L. Kerse, Administrator of the estate of Thomas P. Barry, deceased:

Take Notice: That on the 7th day of May, 1903, at Room 1213, American Trust Building, Cleveland, Ohio, between the hours of 9 A. M. and 6 P. M., of that date, the undersigned will proceed to take the depositions of A. E. King and sundry witnesses, to be read as evidence in its behalf in a certain law suit pending in the Circuit

Court of Kanawha County, West Virginia, wherein you are plaintiff and it is defendant.

If from any cause the taking of said depositions be not
147 commenced or if commenced, be not concluded on that day,
the taking thereof will be adjourned from day to day or from time to time, at the same place and between the same hours until the same shall be completed.

Witness the following signature this 1st day of May, 1913.

THE KANAWHA & MICHIGAN RAILWAY COMPANY.
By W. N. KING &
LEROY ALLEBACH, *Its Attorneys.*

(*Return.*)

Executed the within process on the within named T. E. Kerse, Admr., on the 2 day of May, 1913, by delivering to him in person, an office copy ther-of.

BONNER H. HILL, *S. K. C.*
By —— ——.

In the Circuit Court of Kanawha County, West Virginia.

T. L. KERSE, Administrator of the Estate of Thomas P. Barry, Deceased, Plaintiff,
vs.
THE KANAWHA AND MICHIGAN RAILWAY COMPANY, Defendant.

Depositions of witnesses taken before the undersigned authority in and for the County of Cuyahoga, in the State of Ohio, pursuant to the annexed notice, at room 1213 American Trust Building, in the City of Cleveland, Ohio, on the 7th day of May, 1913, between the hours of 9 A. M. and 6 P. M. of that day, to be read in
evidence on behalf the defendant in a certain suit pending in
148 the Circuit Court of Kanawha County, West Virginia, in
which suit said T. L. Kerse, administrator of the estate of Thomas P. Barry is plaintiff and The Kanawha and Michigan Railway Company is defendant.

Appearances: W. N. King, Esq., for the defendant; no appearance for the plaintiff.

A. E. KING, of lawful age, a witness procuded on behalf of the defendant, being by me first duly sworn, as hereinafter certified deposes and says as follows:

By Mr. King:

Q. You may state your name, residence and occupation.

A. A. E. King, Cleveland, Ohio; general secretary and treasurer of the Brotherhood of Railway Trainmen.

Q. As such general secretary and treasurer what are your duties?

A. Custody of the records and funds of the Brotherhood of Railway Trainmen.

Q. Among the records in your charge, and of which you have custody, do you have the application for beneficiary certificates and the files relative thereto?

A. I do.

Q. You may state, Mr. King, if you have in your files an application and file showing the application of Thomas P. Barry for beneficiary certificate?

A. We have the application for beneficiary certificate of Thomas Barry.

Q. State to what lodge Mr. Thomas Barry made application for membership.

149 A. To our lodge No. 440, located at Cumberland, Maryland.

Q. And I will ask you to give the date of that application?

A. May 12th, 1904.

Q. I wish you would state what this application shows as to whether he was married or single at that time.

A. He stated therein that he was single.

Q. State also to whom that application asked that benefits to be paid under the beneficiary certificate should go.

A. Mrs. Mary Barry, mother.

Q. What, if any, other relatives does he show in the application?

A. He stated in that application at that time that his mother and three brothers were living.

Q. Does your file show whether or not Mr. Barry ever transferred the benefits of this certificate?

A. He did not.

Q. So that at the time of his death the certificate was still payable to his mother?

A. It was.

Q. I will ask you, Mr. King, if the rules of your order would permit the taking from your files of the original application?

A. They would not.

Q. I will ask you to attach a certified copy of the application of Thomas Barry for beneficiary certificate to the Grand Lodge of the Brotherhood of Railroad Trainmen.

A. I will. Here it is, marked Exhibit A.

Q. I will ask you if upon that application a beneficiary certificate was issued?

150 A. It was.

Q. Do you have such beneficiary certificate in your file?

A. I have.

Q. What is the number of the beneficiary certificate?

A. No. 146,490.

Q. Will you please state when that beneficiary certificate was issued and to whom the benefits therein were to be paid?

A. It was issued July 28th, 1904, and the benefits were payable to Mary Barry, mother.

Q. I will ask you, Mr. King, if the rules in your order would permit the taking from your files of the original beneficiary certificate?

A. They would not.

Q. I will ask you if you will attach a certified copy of the beneficiary certificate issued upon the application above referred to?

A. I will. It is attached hereto, marked Exhibit B.

Q. Does your file show to whom the benefits under that certificate were finally paid?

A. They do.

Q. Will you please state to whom, and when?

A. They were paid to Rossa F. Downing, administrator of the estate of Thomas Barry, on September 13th, 1911.

Q. I will ask you to state what your file shows relative to the beneficiary named in that certificate?

A. It shows that the beneficiary died prior to the death of Thomas Barry, certificate holder.

151 Q. And what is the practice of your order when such an event occurs?

A. It is then paid to the administrator of the estate of the certificate holder.

A. E. KING.

The defendant calling for no other witnesses, and the plaintiff not calling for any, the further taking of these depositions is, on motion of the defendant, here concluded, and the Notary is directed to return the said depositions to the office of the Clerk of the Circuit Court of Kanawha County, West Virginia, to be therein filed in the suit of T. L. Kerse, administrator of the estate of Thomas P. Barry, deceased, plaintiff, vs. The Kanawha and Michigan Railway Company, in the notice hereto attached mentioned.

Given under my hand, at Cleveland, Ohio, this 7th day of May A. D. 1913.

JAMES A. NEW KIRK,
*Notary Public in and for*
*Cuyahoga County, Ohio.*

[SEAL.]

*Certificate.*

THE STATE OF OHIO,
*Cuyahoga County, ss:*

I, James A. Newkirk, a Notary Public in and for the county and state aforesaid, duly commissioned and qualified, do hereby certify that the above named A. E. King was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition by him subscribed, as above set forth, was 152 reduced to writing by me, and signed by the witness in my presence; that the same was taken at the time and place in the annexed notice specified.

I do further ce-tify that I am not an attorney or relative of either party to this suit, and am in no wise interested in the event of this action.

In witness whereof, I hereunto set my hand and official seal, at Cleveland, Ohio, this 7th day of May, A. D. 1913.

[SEAL.]

JAMES A. NEW KIRK,
*Notary Public in and for*
*Cuyahoga County, Ohio.*

## Cost Bill.

To taking deposition, 1 hour, 75¢.

## (DEFENDANT'S EXHIBIT A.)

Newkirk & Forrest,
(Shorthand Reporters, Cleveland, O.)

## Form A.

*Application for Beneficiary Certificate to the Grand Lodge of the Brotherhood of Railroad Trainmen.*

I, Thomas Barry (Name in full) hereby make application through Lodge No. 440 for a Beneficiary Certificate, Class C $1350 in the Brotherhood of Railroad Trainmen, and for that purpose make the following statements as the basis of the contract between said Brotherhood and myself:

1. A. Postoffice address 17 Frederick St. B. Occupation, Brakeman. C. Married or single, Single. D. Date of birth year...., month...., day of month ........ E. Age 31 years 7 months. Employed on ............... R. R.

153 2. A. Are you now a member of this Brotherhood? No. Number of Lodge? ..... B. Have you ever been a member of the B. of R. B. or B. of R. T.? No. C. If so, when?...... Where? ........ Lodge No. .... D. Are you now insured? No. E. Give amount in each company or other organization. None.

Note.—If formerly a member, give number and location of lodge and as nearly as possible date your membership terminated. If expelled for non-payment of dues a Readmission Card F, 109½, must accompany this application, or be furnished before it can be considered by the G. S. & T.

3. A. Have you ever applied to any Company, Society or Agent for insurance without receiving a certificate or policy of the kind and amount asked? No. B. If so, state particulars ............

4. A. Do you use alcoholic or other stimulants? Yes.

B. If so, state definitely what kind, and the amount used daily or per week? Beer or whiskey, one drink once or twice a week.

C. Do you now or have you ever used opium, chloral, chloroform, or other deleterious stimulants or narcotics? No.

D. Are you now or have you ever been engaged in the sale or manufacture of intoxicants? No.

E. Do you warrant these statements as to the use of stimulants and narcotics to be true, and agree that their use to an extent liable to injure your health, shall void this contract? Yes.

5. A. To whom do you want benefits to be made payable? Mrs. Mary Barry.

(All names in full.)

154 B. If mother, sister, wife or any female, we must have her own full given name.

C. State relationship of the person or persons to you. Mother.

(Benefits Payable to: Parents, children, adopted children, lawful wife, affianced wife, blood relation, or persons lawfully dependent upon the member, provided that a member having no wife or children living may, with the consent of the Grand Lodge make a charitable institution or a subordinate lodge of the Brotherhood his beneficiary.)

D. State whether such person or persons are members of your family ..................................................

E. State whether such person or persons are lawfully dependent upon you for support. Yes.

Address of beneficiary 217 College St., Martinsburg, W. Va.

F. Have you wife or children living? No.

I hereby warrant the foregoing statements and answers to be true, full and complete.

Dated Cumberland, Md. this 12 day of May, 1904.

Applicant's signature (all names in full)

THOMAS BARRY.

Witness:
ALBERT L. REXROAD,
—— Lodge No. ——.

This application must be sent to General Sec'y and Treas., and notice of approval must be received by lodge before the admission of applicant. This application must be complete in every particular or will be returned for completion.

### Form B.

—Number —. (Write with ink.)

*Applicant's Certificate.*

This blank must be filed by the Medical Examiner in his own handwriting. The Examiner will ask and the applicant answer all questions separately, and by "yes" or "no," when practicable. Do not answer with a Dash. 155

1. A. Are you now in good health?.........................

B. What parent do you most resemble?....................

2. A. Have you consulted a physician during the last five years? A ..................................................

B. When and for what disease or injury? B...............

C. State present condition. C.........................

D. Give the name and residence of such physician? D..........

E. Give the name and residence of your medical adviser. E.....

(Or family physician, to whom you now refer for a certificate if deemed necessary.)

F. Has any physician given an unfavorable opinion of your physical condition with reference to life insurance? F............

G. Have you ever changed climate or occupation on account of your health? G..........................................

3. State, as far as you know, the following particulars in regard to your grand-parents, parents, brothers and sisters.

Family Record of the Applicant.
Age —. Living —. Health —.
Father ..................................................
Father's father..........................................
Father's mother ........................................
Mother ..................................................
Mother's father..........................................
Mother's mother ........................................
Brothers ................................................
Sisters ..................................................
Dead..... Age..... Cause of Death..... How long.....
Previous Health.... Sick....
156 ........................................................
........................................................

4. Have any of your grand-parents, uncles, aunts, parents, brothers and sisters been afflicted with consumption, spitting of blood, rheumatism, insanity, or with pulmonary, scrofulous, tuberculous, cancerous or any hereditary disease?

If so, state particulars ..........................................

5. Have you ever been afflicted with any of the following complaints or diseases? ("yes" or "No.")

A. Insanity, apoplexy, palsy or paralysis, vertigo, fits or convulsions, delirium tremens, sunstroke, or congestion, inflammation or any other disorder of the spine, brain or nervous system? A.....

B. Asthma, bronchitis, pneumonia, pleurisy, consumption, spitting of blood, habitual cough or expectoration, shortness of breath, palpitation, or any disease of the throat, heart or lungs? B........

C. Jaundice, chronic diarrhœa or constipation, fistula, piles, gall stones or gravel, renal or hepatic colic, dropsy, syphilis, or stricture, or any disease of the alimentary, genital or urinary organs? C....

D. Cancer or tumor, scrofula, discharge from the ear, ulcers or open sores, chronic rheumatism, gout, varicose veins, or any malformation? D ..................................................

E. Have you ever had any illness or injury other than as stated above? E ..................................................

F. Have you ever undergone any surgical operation? F........
If so, state particulars............................................
See Instruction No. 7 to Medical Examiner.

Hearing.
Right Ear —— 20
Left Ear —— 20

Vision.
Right Eye —— 20
Left Eye —— 20

157 6. A. Have you ever had inflammatory Rheumatism? (If so, give particulars as to dates, number of attacks, duration, etc.) .............. Was it accompanied with shortness of breath or cough?........................................

If any amputation of fingers or toes, show exact line of such amputation on following cuts, and give full statement as to present condition of injured hand or foot..............................

..................................................................

(Drawing showing bones of hand and foot.)

7. A. Have you hernia, or have you ever been ruptured? ......

B. If so, do you now wear a suitable truss?....................

C. If you should become ruptured, do you agree to wear a suitable adjusted truss?........................................

D. What is your height?.....ft......in. Weight?......lbs.

F. Has your weight recently increased or diminished?.........

If so, to what extent and from what cause?..................

Note Carefully the Following Declaration and Agreement.

I, the undersigned applicant, hereby agree that any certificate of insurance based upon this application shall be void should I personally engage in the naval, military or marine service (except in time of peace) without first having obtained the written consent of the Grand Lodge of the Brotherhood of Railroad Trainmen; that all the foregoing statements and answers to questions in Forms "A" and "B" I adopt as my own, admit to be material, warrant to be true, full and complete, and make the basis of the contract with said Brotherhood, and in the event any untrue or incomplete statements or answers have been made this contract shall be null and void and of no effect. Any beneficiary certificate based upon this application shall be held to be a contract made in the State of Ohio and subject to its laws.

Applicant —— ——
(Name in full.)

Witness:

—— ——,
*Medical Examiner.*

158 Examine in Private.

*Instructions to Medical Examiners.*

1st. Habits.—Make a through, private physical examination; carefully note pulse and respiration, and elicit all important facts relative to the applicant's present and past physical condition and habits.

2nd. Family History.—Obtain full particulars as to family history; avoid use of obscure causes of death, as "Child Birth," "Change of Life," "Exposure," "General Debility," "Dropsy," "Fever," etc.; if unavoidable explain.

3rd. Hernia.—Examine cases of hernia supposed to be cured; or if rupture exists, see that a properly fitting truss is worn.

4th. Urine must be tested by heat and nitric acid for albumin, specific gravity taken, and when the same is above 1025 tested for sugar.

5th. Measure and Weight.—Measure applicant carefully, and judiciously consider relative weight, height and measurements.

6th. Satisfy yourself fully as to any disorder or disease which would affect the longevity of the applicant, and see that all questions are properly answered.

7th. Applicant must be able to hear ordinary conversation, names or numbers spoken in conversation tones at a distance of twenty feet, in which case the hearing should be expressed by the fraction 20-20. Should the candidate hear such conversation at ten feet, the hearing power should be expressed by 10-20, etc. Normal vision is expressed by fraction 20-20.

Write with Ink.

## Form C.

*Questions to be Answered by Medical Examiner.*

1. A. How long have you personally know applicant?........
B. Does appearance indicate good health?..................
2. A. Circumference of chest on full inspiration, under vest ....in.
B. On forced expansion....in.
C. Girth of Abnomen....in.
D. Are you satisfied that the figures as to weight and height are correct?..........................................
3. A. General figure ....................................
B. Completion ........................................
C. Color of eyes .....................................
D. Color of hair ..................................
159 E. Shape of chest (full or flat)......................
4. Exaxmination of heart.
A. Is the heart's action uniform, free and steady? A..........
B. Are the valvular sounds healthy? B.....................
C. Are the heart and blood vessels free from any indication of disease? C..........................................
D. What is the character of the pulse as to fullness, compressibility, etc.? D.......................................
E. What is the pulse rate, sitting? E......................
F. Standing? F ........................................
5. Examination of Lungs.
A. Is the respiratory murmur full, clear and distinct in every part of each lung? A..................................
B. Is there freedom from abnormal sounds throughout each lung? B ..........................................
C. Are the nose, throat and lungs free from any indication of

disease? C ........................................

D. Rate of respiration per minute. D ........................

Explanation ........................................

6. Examination of the Brain, Digestive Organs, etc.

A. Is there any discharge from the ear? ........................

B. Has the aplicant any disease or disorder of the brain or nervous system? ........................................

C. State form of hernia? ........................................

D. If ruptured, does he use a suitable truss? ........................

*F.* Has it ever been strangulated? ........................

*E.* Is there any evidence of syphilis or any genito-urinary disease? ........................................

G. Is there any evidence of disease of the stomach, bowels or liver? ........................................

H. Is there any eruption on the body? ........................

I. Has he had any disease or disorder which affects his present health? ........................................

7. Examination of Urine.

A. Specific Gravity ........................................

B. Albumin ........................................

C. Sugar ........................................

If either, explain fully ........................................

D. Was the urine passed in your presence? ........................

E. Is the urine scanty or over-abundant? ........................

8. Do you suspect predisposition, hereditary or acquired, to phthisis, cancer, apoplexy, or disease of the kidneys? ............

9. Do you advise the acceptance of the risk? .... ("yes" or "no")

I graduated at —— 1—.
Dated at —— this — day of —— 19—.

—— ——, *M. D.*
*Medical Examiner.*

160 Note.—This application will expire 30 days from above date if not received by G. S. & T. in complete form before that time. Any change, or alteration in date, will make this application void unless satisfactorily expiained by the Medical Examiner.

(Back of Form.)

Lodge No. ........ App'n No. ........
(Form 131.) Cert. No. ........

*Application for Beneficiary Certificate.*

Age ........ Class ........ $ ........
Name ........................................
Town ........................................
Street No. or P. O. Box ........................
County ............ State ............

Do not fail to give full name and Post Office address. It is necessary to have full address for The Trainman mailing list.

See that all names are plainly and correctly written and all questions fully and properly answered. A careful filling of the blank is absolutely necessary.

---

(Leave space Below Blank.)

### *Rules for the Lodge.*

1. An applicant must be not less than 18 nor more than 45 years of age.

2. Ink must be used in filling out every part of the "Application for Beneficiary Certificate."

3. A supply of blank applications for Beneficiary Certificates should always be in the possession of the Medical Examiner.

4. Two blank forms are used by applicants for membership.
The first is designated as an "Application for Membership"
161 and the second as an "Application for Beneficiary Certificate." (Form 131.)

5. Each application for membership must be accompanied by a proposition fee of one dollar, as provided in Section 125 Constitution Subordinate Lodges.

6. The "Application for Beneficiary Certificate" must be filled out in every question and other detail before it is forwarded to the Grand Lodge. Any omission whatever will cause the blank to be returned to the Lodge that forwarded it.

7. A person desiring to apply for membership is first given an "Application for Membership" (form 130), which he fills out and signs. This blank refers to age, occupation, residence, etc., and must be witnessed by a member in good standing. The applicant is then directed to call on the Medical Examiner who examines the applicant, and makes a report of his examination on the blank designated as the "Application for Beneficiary Certificate." The Application for Membership (Form 130) and the Application for Beneficiary Certificate (Form 131) should be presented to the first regular meeting of the lodge, and if the Application for Membership (Form 130) is accepted it should be referred to proper committee, and the Application for Beneficiary Certificate (Form 131) immediately forwarded to the General Secretary and Treasurer.

No applicant shall be admitted, where medical examination is required, until notice has been received of the approval of the "Application for Beneficiary Certificate" by the G. S. & T. An application for admission (either as a beneficiary of nonbeneficiary
member), by initiation, by deposit of withdrawal card or
162 dispensation, or for readmission when more than sixty days
have elapsed since date of expulsion, is required to pass a medical examination.

The Medical Examiner should observe fully the following:

The applicant shall be white male, sober, industrious and must join of his own free will. He must not be less than eighteen and not to exceed forty-five years of age. With his application for membership he must present an application for a beneficiary certificate of the class he so elects, as provided in Section 60 of the Constitution of the Grand Lodge, together with a certificate from the Medical Examiner that he is sound in body and limb; provided, however, that the loss of two fingers or the loss of one finger and thumb from one hand, or the loss of the toes of one foot, shall not disqualify him for beneficiary membership, if he is otherwise able to meet the physical requirements.

The condition of the applicant, with regard to his liability to become totally disabled, must be fully considered, and no applicant who is predisposed to total disability from impaired hearing or eyesight, or other disease or cause, should be recommended for membership.

1. He should not be recommended if he has had hæmoptysis, until after ten years, and then only in the most favorable cases.

2. If he is subject to attacks of asthma.

3. If he has had gravel or calculus within three years, or
163 subject to such attacks within five years.

4. If he has had anal fistula.

5. If he has had apoplexy, dropsy, insanity, habitual cough, chronic ulcer, fits of any description or organic diseases of the heart, liver or kidneys within seven years.

6. If both parents have died from consumption.

7. If either parent died from consumption and the applicant has not attained the age of thirty years.

8. If he has double hernia.

## (Defendant's Exhibit B.)

No. 146,490.

### Grand Lodge Brotherhood of Railroad Trainmen.

This beneficiary certificate issued by the Grand Lodge of the Brotherhood of Railroad Trainmen,

Witnesseth: That Brother Thomas Barry a member of Wm. M. McKaig Lodge, No. 440, of said Brotherhood, is entitled to all the rights, privileges and benefits of membership, and to participate in the beneficiary department, Class C, of said Brotherhood to the amount set forth in the Constitution thereof, which amount in the event of his total and permanent disability shall be paid to him, or at his death shall be paid to Mary Barry his mother if living; if not to the executors or administrators of said member, in trust,
however, for, and to be forthwith paid over to his heirs at
164 law, and the amount to be paid hereunder shall become due
only upon the presentment of proper proofs of the death of the assured, and the legal right of such executor or administrator to receive the same, such proofs to be made in accordance with the Constitution and By-laws of the Brotherhood.

This Certificate is issued on the express conditions that the said

Thomas Barry shall comply with the Constitution, By-laws, rules and regulations, now in force or which may hereafter be adopted by the witnin named Brotherhood, which, as printed and published by the Grand Lodge of the said Brotherhood, are made a part hereof; and that he pay all dues and assessments imposed upon him within the time specified by the Constitution and By-laws, and any failure to make such payment of either Grand or Subordinate Lodge dues, or any general or special assessment levied, shall at once forfeit any and all rights hereunder, and this Certificate shall become null and void without notice to the assured; nor shall any payment by or for the assured, of either dues or assessments after such forfeiture, revive this Certificate or confer any rights hereunder.

In witness whereof, The Grand Lodge of the Brotherhood of *of* Railroad Trainmen hath, by its Grand Master and Grand Secretary and Treasurer, signed and delivered this Certificate at its office in Cleveland, Ohio, this 28th day of July One thousand Nine
165 hundred and Four.

[SEAL.]

O. H. MORRISSEY,
*Grand Master.*

A. E. KING,
*Grand Secretary and Treasurer.*

THOMAS BARRY,
*Signature of Assured.*

We, the undersigned, Financier and Secretary of Wm. M. McKaig Lodge, No. 440, do hereby certify to acceptance of this Certificate by Brother Thomas Barry, upon the conditions above set forth.

Witness our hand and the seal of our Lodge, this 1 day of August 1904.

[SEAL.]

C. H. LITTLE, *Secretary.*

H. KELLER, *Financier.*

(Back of Policy:) Beneficiary Certificate. Class C. Number 146,490. Issued to Thomas Barry by the Grand Lodge of the Brotherhood of Railroad Trainmen.

166 *First Transfer.*

To the Grand Secretary and Treasurer of the Brotherhood of Railroad Trainmen:

I hereby revoke my direction as to the payment of the within Certificate, and now request and direct said payments in the event of my death, to be made to —— ——, whose relation to me is that of ——, and whose residence is —— ——.

[SUBORDINATE LODGE SEAL.] Witness my hand and seal this — day of ——, 190—.

(Signed)

—— ——. [SEAL.]

Attest:

—— ——, *Secretary.*

This Certificate transferred on the Books of the Grand Lodge in accordance with the above request and direction this — day of——, 190—.

[GRAND LODGE SEAL.]

Witness my hand and Seal of the Grand Lodge.

—— ——,
*Grand Sec'y and Treas.*

*Second Transfer.*

To the Grand Secretary and Treasurer of the Brotherhood of Railroad Trainmen:

I hereby revoke my directions as to the payment of the within Certificate, and now request and direct said payment, in the event of my death, to be made to —— ——, whose relation to me is that of ——, and whose residence is —— ——.

167 [SUBORDINATE LODGE SEAL.] Witness my hand and seal this — day of ——, 190—.

(Signed) —— ——. [SEAL.]

Attest:
—— ——, *Secretary.*

This Certificate transferred on the Books of the Grand Lodge in accordance with the last above request and direction this — day of ——, 190—.

[GRAND LODGE SEAL.]

Witness my hand and the Seal of the Grand Lodge.

—— ——,
*Grand Sec'y and Treas.*

168 *Notice to Take Depositions.*

To T. L. Kerse, Administrator of the estate of Thomas P. Barry, Deceased:

Take Notice: That on the 10th day of May, 1913, at Room 84, Third National Bank Bldg., Cumberland, Md., between the hours of 9 A. M. and 6 P. M., of that day, the undersigned will proceed to take the depositions of Mrs. Thomas P. Barry, and others, to be read as evidence in its behalf in a certain law suit pending in the Circuit Court of Kanawha County, West Virginia, wherein you are plaintiff and it is defendant.

If from any cause the taking of said depositions be not commenced, or if commenced be not concluded on that day, the taking thereof will be adjourned from day to day or from time to time, at the same place and between the same hours until the same shall be completed.

Witness the following signature this 2nd day of May, 1913.

THE KANAWHA & MICHIGAN RAILWAY COMPANY,
By W. N. KING &
LEROY ALLEBACH,
*Its Attorneys.*

(*Return.*)

Executed the within process on the within named E. T. Kerse, Adm'r, on the 2 day of May, 1913, by delivering to him in person, an office copy ther-of.

BONNER H. HILL, *S. K. C.*,
By —— ——.

169 In the Circuit Court of Kanawha County, West Virginia.

T. L. Kerse, Administrator of the Estate of Thomas P. Barry, Deceased, Plaintiff,
vs.
The Kanawha and Michigan Railway Company, Defendant.

Depositions of witnesses taken before the undersigned authority in and for the County of Allegany, in the State of Maryland, pursuant to the annexed notice at room 84, Third National Bank Building, Cumberland, Maryland, on the tenth day of May, 1913, between the hours of 9 A. M. and 6 P. M. of that date, to be read in evidence on behalf of the defendant in a certain lawsuit pending in the Circuit Court of Kanawha County, West Virginia, in which suit said T. L. Kerse, administrator of the estate of Thomas P. Barry, deceased, is Plaintiff, and the Kanawha and Michigan Railway Company is Defendant.

Appearances: Leroy Allebach for the defendant; no appearance for the plaintiff.

Ella Amelia Barry, a witness of lawful age, on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

By Mr. Allebach:

Q. Give your name, age and residence?
A. My name is Ella Amelia Barry; my age is thirty; my residence is 38 Frederick Street, Cumberland, Md.
Q. 2. What was your name before you were married?
A. Ella Amelia Wright.
170 Q. When did you meet your husband, Thomas P. Barry?
A. Sept. 29, 1904.
Q. How long were you acquainted with him before you were married, and when were you married to him?
A. About eighteen months. We were married March 6, 1906.
Q. What knowledge, if any, did you have of any former marriage of Mr. Barry?
A. I had no knowledge of it at all.
Q. What representations, if any, did he make to you as to his being married or single prior to your marriage?
A. There was none; he simply said he was not married.
Q. Where were you married to him?

A. At Ellerslie, Pa.

Q. Why were you not married at home?

A. My mother objected to him on account of his being a Catholic. We, therefore, slipped off to Ellerslie, Pa., and were married without my parents' knowledge.

Q. By whom were you married?

A. Rev. G. W. Cooper. I think he was a Unitarian Minister. I was a member of the English Reform Church.

Q. Have you a certificate of your marriage to Mr. Barry?

A. No.

Q. Why can you not produce this marriage certificate?

A. Because he had it in his possession and when he went away he took it with him.

Q. Did you ever see that certificate and was it signed by Rev. Cooper?

171 A. Yes, I saw it many times and it was signed by Rev. Cooper.

Q. After your marriage with Mr. Barry, where did you first live?

A. We lived first on Altamont Terrace; then at the Sterling Hotel and then at my father's home.

Q. Did you have any children by this marriage? If so, how many and the date of birth?

A. I had one child, a girl, born Dec. 23, 1906.

Q. When did you last see Mr. Barry?

A. On the 23rd day of May, 1907, he, in the evening, came to our house and told me that he was out of work in Cumberland, but he had secured a position from the railroad in McKeesport, Pa., and was going there that night. He said he would send for me as soon as he could — things ready. He came to the house about four o'clock in the afternoon and stayed until supper time. He then went to a restaurant to get his supper and returned to the house about nine o'clock. He stayed until about twelve, or near the time his train was due to leave for Pittsburg. I have never seen him from that day to this.

Q. In a former answer you say that after leaving the Sterling Hotel you return- home; did your husband room with you at your father's home? If not, why?

A. We never had kept house. We had rooms and had taken our meals at the restaurant. On account of the near approach of the birth of my child, I wanted to be with my mother and as Mr. Barry was working in the B. & O. yards at night, we thought it better all around if he would continue to room at the Sterling Hotel
and I take a room with my mother. After the birth of the
172 baby, we continued the same arrangement, but there was no
quarrel or estrangement of any kind between us.

Q. Where was Mr. Barry rooming in Cumberland at the time he left here, and how long had he been there?

A. With Mrs. Myrtle Wigley on Harrison Street. He was there about four months.

Q. What communication did you have with Mr. Barry after his leaving Cumberland?

A. None whatever.

Q. Did he ever write to you or come to see you?

A. No.

Q. What was Mr. Barry's employment during all the time you knew him in Cumberland?

A. He always worked in the railroad yard.

Q. What support, if any, to your knowledge did Mr. Barry contribute to his first wife and child in Washington, D. C.?

A. He didn't support her at all that I know of; I didn't know she existed, but I would have known had he supported her.

Q. What were Mr. Barry's wages while working in the yard?

A. At first he got $2.20 a day, but afterwards, the wages were raised, but I do not know to what amount.

Q. What position on the railroad did he hold?

A. That of Yard Brakeman.

And further this deponent sayeth not.

ELLA AMELIA BARRY.

173 The defendant calling for no other witnesses, and the plaintiff not calling for any, the further taking of these depositions is, on motion of the defendant, here concluded and the notary is directed to return the said depositions to the office of the Clerk of the Circuit Court of Kanawha County, West Virginia, to be therein filed in the suit of T. L. Kerse, administrator of the estate of Thomas P. Barry, deceased, plaintiff, vs. The Kanawha and Michigan Railway Company, in the notice hereto attached mentioned.

Given under my hand and official seal at Cumberland, Maryland, this tenth day of May, A. D., 1913.

[SEAL.] NELLIE BRADY,

*Notary Public in and for Allegany County, Maryland.*

My commission expires May, 1914.

STATE OF MARYLAND,
*County of Allegany, ss:*

I, Nellie Brady, a Notary Public in and for the county and state aforesaid, duly commissioned and qualified, do hereby certify that the above named Ella Amelia Barry was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition by her subscribed, as above set forth, was reduced to writing by me, and signed by the witness in my presence; that the same was taken at the time and place in the annexed notice specified, and that the fee bill hereto annexed is correct.

I do further certify that I am not an attorney or relative of either party to this suit, and am in no wise interested in the event of this action.

In witness whereof, I hereunto set my hand and official seal, at Cumberland, Maryland, this tenth day of May, A. D. 1913.

174 [SEAL.] NELLIE BADY,
*Notary Public in and for Allegany County, Maryland.*

My commission expires May, 1914.

Fee Bill:

| | |
|---|---|
| To Taking depositions, 1 hour.. | 75¢ |
| Witness one day ............. | $1.00 |

### *Notice to Take Depositions.*

To T. L. Kerse, Admr. of the estate of Thomas P. Barry, deceased:

Take notice: That on the 12th day of May, 1913, at the Office of the Prothonotary of Bedford County, at the Court House thereof, in the City of Bedford, Pennsylvania, between the hours of 9 A. M. and 6 P. M. of that day, the undersigned will proceed to take the depositions of witnesses to be read as evidence on its behalf in a certain law suit pending in the Circuit Court of Kanawha County, West Virginia, wherein you are plaintiff and it is defendant.

If from any cause the taking of said depositions be not commenced, or if commenced be not concluded on that day, the taking thereof will be adjourned from day to day or from time to time, at the same place and between the same hours until the same shall be completed.

Witness the following signature this 2nd day of May, 1913.

THE KANAWHA & MICHIGAN
RAILWAY COMPANY,
By W. N. KING &
LEROY ALLEBACH,
*Its Attorneys.*

175 *(Return.)*

Executed the within process on the within named T. E. Kerse Admr., on the 2 day of May, 1913, by delivering to him in person, an office copy ther-of.

BONNER H. HILL, *S. K. C.*,
By —— ——.

Depositions of witnesses taken before the undersigned authority in and for the County of Bedford, in the Commonwealth of Pennsylvania, pursuant to the annexed notice, at the office of the Prothonotary of Bedford County, at the Court House thereof, in the City of Bedford, Pennsylvania, on the 12th. day of May, 1913, between the hours of nine A. M. and six P. M. of that day, to be read in evidence on behalf of the defendant in a certain law suit pending in the Circuit Court of Kanawha County, West Virginia, in which suit T. L. Kerse, administrator of the estate of Thomas P. Barry, deceased, is plaintiff, and the Kanawha Michigan Railway Company is defendant.

Appearances: Leroy Allebach for the defendant; no appearance for the plaintiff.

James C. Russell, a witness of lawful age being by me first duly sworn, deposed and said as follows:

By Mr. Allebach:

Q. What is your name, residence and occupation?

A. My name is James C. Russell, and my residence is Bedford, Pa. My occupation is Deputy Clerk of the Orphans' Court of Bedford County, Pennsylvania.

176 Q. As Deputy Clerk, have you custody of the applications for marriage licenses and the Docket in which they are recorded?

A. I have.

Q. I herewith hand you a paper and ask you what is it?

A. It is a certified copy of the application for marriage license on the part of Thomas Barry for marriage with Ella Amelia Wright. It is recorded in Marriage License Docket No. 11, at page 293, and has the number 5959. This license was applied for by Thomas Barry on the 6th day of December, 1906. Was sworn to before Mr. Derrick, the then Clerk of the Orphans' Court, on that date.

Q. Mr. Russell, I notice that in the question on this application for marriage license being "date of death of man's former wife, if any," the answer is merely a check. What does that mean?

A. That means that the answer of the applicant to that question was that he was not formerly married. If he had been married before the answer would have been put down opposite the question. The answer would have been that he was married before and that his wife had died or that he had been legally divorced, otherwise the application would have been refused. There are other similar marks to questions put to the applicant, said questions being numbered from ten to fifteen inclusive and nineteen and twenty, in each of which the answer of the defendant was marked by a similar mark, and is taken as no to the question asked.

Q. Mr. Russell, I hand you herewith another paper and ask you what is is?

177 A. This is a certified copy of the Marriage License No. 5959, dated the 6th. day of December, 1906, and signed by

G. W. Derrick, Clerk of the Orphans' Court at that date, which is in compliance with the application made for marriage license at that date and number. It is so numbered and agrees with the entry made upon the marriage license docket No. 11, at page 293 as above stated. The license was issued and no certificate of the marriage ceremony was ever returned to this office and does not appear on the record following the application and the marriage license as it should do if the marriage ceremony had been performed and the certificate returned in compliance with the marriage license and of this State of Pennsylvania.

Hereupon defendant offers in evidence the certified copies of the application for license and the license — was issued upon said application and asks that they be filed as defendant's exhibit "A."

JAMES C. RUSSELL,
*Deputy Clerk Orphans' Court of Bedford Co., Penna.*

The defendant calling for no other witnesses, and the plaintiff calling for none, the further taking of these depositions is, on motion of the defendant here concluded, and the Notary is directed to return the said depositions to the Office of the Clerk of *the Clerk of* Courts of Kanawha County, West Virginia, to be therein filed in the
lawsuit of T. L. Kerse, administrator of the estate of Thomas
178 P. Barry, deceased, versus the Kanawha — Michigan Railway Company in the notice hereto attached mentioned.

Given under my hand and official seal at Bedford, Pennsylvania, this twelfth day of May, 1913.

[SEAL.] LULU V. NAUS,
*Notary Public, of Bedford County, Pennsylvania.*

My commission expires, Feb. 4, 1917.

COMMONWEALTH OF PENNSYLVANIA,
*Bedford County, ss:*

I, Lula V. Naus, a Notary Public, in and for the County and Commonwealth aforesaid, do hereby certify that the above named James C. Russell was by me first duly sworn. And that the deposition by him subscribed as above set forth was reduced to writing by me and signed by the witness in my presence; That the same was taken at the time and place in the annexed notice specified, and that the fee bill hereto annnexed is correct.

In witness whereof I have hereunto set my hand and official seal at Bedford, Pa., this twelfth day of May, 1913.

[SEAL.] LULU V. NAUS,
*Notary Public, of Bedford County, Penna.*

My commission Expires February 4, 1917.

*Fee Bill.*

| | |
|---|---|
| To Taking depositions one hour. . | $ .75 |
| Witness, one day .............. | 1.50 |
| Certified copy of exhibit ........ | 1.50 |

All costs paid by defendant.

179 *Application for Marriage License.*

No. 5959.

1. Full name of the man, 1. Thomas Barry.
2. Full name of the woman, 2. Ella Amelia Wright.
3. Relationship of the parties, either by blood or marriage, 3. None.
4. Age of the man, 4. 33.
5. Age of the woman, 5. 24.
6. Residence of the man, 6. Cumberland, Md.
7. Residence of the woman, 7. " "
8. Parents' names of man, 8. John and Mary Barry.
9. Parents' names of the woman, 9. John and Rachel Wright.
10. Guardian's name of man, 10. //
11. Guardian's name of woman, 11. //
12. Date of death of man's former wife, if any, 12. //
13. Date of death of woman's former husband, if any, 13. //
14. Date of divorce of man at any time, 14. //
15. Date of divorce of woman at any time, 15. //
16. Color of parties, 16. White.
17. Occupation of man, 17. Railroader.
18. Occupation of woman, 18. None.
19. Consent of parents or guardian of man. 19. //
20. Consent of parents or guardian of woman. 20. //

BEDFORD COUNTY, *ss*:

Personally appeared before me Clerk of O. C. in and for said County Thomas Barry who being duly qualified according to
180 law, did depose and say that the statements above set forth are correct and true, to the best of his knowledge and belief.

THOMAS BARRY,
—— ——.
*Applicants.*

Sworn and subscribed before me, this 6th day of December, A. D. 1906.

[SEAL.]

G. W. DERRICK,
*Clerk of O. C...*

DEFENDANT'S EXHIBIT "A." Lulu V. Naus, Notary Public.

### *Marriage License.*

No. 5959.

To Any Minister of the Gospel, Justice of the Peace, or Other Officer or Person Authorized by Law to Solemnize Marriage:

STATE OF PENNSYLVANIA,
*County of Bedford, ss*:

Legal evidence having been furnished me in accordance with the Act of Assembly approved the 23rd day of June, one thousand eight hundred and eighty-five, you are hereby authorized to join together in the holy state of Matrimony, according to the rites and ceremonies of your church, society or religious denomination and the law of the Commonwealth of Pennslvania, Thomas Barry of full age and never before married and Ella Amelia Wright likewise of full age and never before married.

Given under my Hand and Seal of the Orphans' Court of said County at Bedford this 6″ day of December, A. D. 1906.

G. W. DERRICK, *Clerk O. C.*

181 *Duplicate Certificate.*

(To be returned to the Clerk of the Court within thirty days after marriage.)

No. —.

I, —— —— hereby certify, that on the — day of —— one thousand nine hundred and — at —— —— —— and —— —— were by me united in marriage, in accordance with license issued by the Clerk of the Orphans' Court of Bedford County, Pennsylvania, numbered —.

—— ——,

*Minister of the Gospel, Justice of the Peace, or Alderman.*

### *Original Certificate.*

(To be given to the persons married.)

No. —.

I, —— —— hereby certify, that on the — day of —— one thousand nine hundred and — at —— —— —— and —— —— were by me united in marriage, in accordance with license issued by the Clerk of the Orphans' Court of Bedford County, Pennsylvania, numbered —.

——— ———,
*Minister of the Gospel, Justice of the Peace, or Alderman.*

COMMONWEALTH OF PENNSYLVANIA,
*County of Bedford, ss:*

182 I, A. S. Guyer, Clerk of the Orphans' Court in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the whole record of the case therein stated, viz: the application for a marriage License for Thomas Barry and Ella Amelia Wright, No. 5959, and the license issued in compliance therewith, so full and entire as the same remains of record before the said Court in Marriage License Book No. 11, at page 293.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twelfth day of May, A. D. 1913.

[SEAL.]

A. S. GUYER,
*Clerk of the Orphans' Court.*

I, Joseph M. Woods, President Judge of the 20th Judicial District composed of the Counties of Bedford, Huntingdon and Mifflin, do certify that A. S. Guyer, by whom the annexed record, certificate and attestation were made and given, and who in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Orphans' Court of said County, was at the time of so doing and now is clerk of the Orphans' Court in and for said County of Bedford, in the Commonwealth of Pennsylvaina, duly commissioned and qualified, to all of whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that the said record, certificate and attes-
183 tation are in due form of law, and made by the proper officer.

JOSEPH M. WOODS,
*Judge.*

COMMONWEALTH OF PENNSYLVANIA,
*County of Bedford, ss:*

I, A. S. Guyer, Prothonotary of the Court of Common Pleas in and for the said County, do certify that the Honorable Joseph M. Woods, Esq., by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof and still is President Judge of the Court of Common Pleas, Orphans' Court and Court of Quarter Sessions of the Peace in and for said County, duly commissioned and qualified; to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twelfth day of May, A. D. 1913.

[SEAL.]

A. S. GUYER,
*Prothonotary.*

(Back:) No. —. — Term, 19—. In re application of Thomas Barry for a Marriage License with Ella Amelia Wright.
184 Exemplified Record from Bedford County, Penna. Costs pd. by Leroy Allebach, $1.50. A. S. Guyer, Clerk, O. C.

Depositions of witnesses taken before the undersigned authority in and for the City of Baltimore, in the State of Maryland, pursuant to the annexed notice, at the office of the General Counsel of The Baltimore and Ohio Railroad Company, in the City of Baltimore, Maryland, on the thirteenth day of May, 1913, between the hours of 9 A. M. and 6 P. M. of that day, to be read in evidence on behalf of the defendant in a certain law suit pending in the Circuit Court of Kanawha County, West Virginia, in which suit T. L. Kerse, Administrator of the estate of Thomas P. Barry, is plaintiff and the Kanawha and Michigan Railway Company is defendant.

Appearances:

Leroy Allebach, Assistant Attorney, for the defendant.
No appearance for the plaintiff.

S. R. Barr, a witness of lawful age being duly sworn, deposed and said as follows:

By Mr. Allebach:

1st Ques. Give your name, residence and occupation?

Ans. My name is S. R. Barr, residence, Baltimore City, Maryland; occupation, Superintendent, Relief Department, The Baltimore and Ohio Railroad Company.

2nd Ques. As such Superintendent, what are your duties?

Ans. I have charge of the Relief Department, with its papers and records.

185 3rd Ques. As such Superintendent, do you have the application of Thomas Barry among your records for membership in your Relief Department?

Ans. Yes sir.

4th Ques. What was the date of this application?

Ans. January 23, 1904.

5th Ques. Was he employed at that time on your railroad?

Ans. He was employed as a brakeman on the Cumberland Division under General Yard Master, W. J. Miland, of Cumberland.

6th Ques. In his application what does he state as to his ever having been married?

Ans. In answer to the question, he stated that he had never been married.

7th Ques. Whom does he name as his beneficiary?

Ans. His mother, Mary, residing at Martinsburg, West Virginia.

8th Ques. Who else does he state as his next of kin?

Ans. Three brothers and sisters; no names given.

9th Ques. When did he terminate his connection with The Baltimore and Ohio Railroad?

Ans. He resigned from the service on May 18, 1907.

10th Ques. What, if anything, was coming to him at that time?

Ans. Eighty cents was due him as a refund of unearned premium for the month in which he left the service.

11th Ques. Will you, Dr. Barr, file this original application as an exhibit with this deposition?

Ans. I will.

12th Ques. I hand you herewith a paper and ask you what it is?

186 Ans. This is the application of Thomas Barry for membership under the Relief Department.

13th Ques. Is that the one which Thomas Barry signed himself?

Ans. It is, to the best of my knowledge and belief.

Hereupon, defendant offered in evidence the application of Thomas Barry for membership in the Relief Department of The Baltimore and Ohio Railroad and asks that it be filed as Defendant's Exhibit "A."

And further deponent saith not.

S. R. BARR.

The defendant calling for no other witnesses, and the plaintiff calling for none, the further taking of these depositions is, on motion of the defendant, here concluded, and the Notary is directed to return the said depositions to the office of the Clerk of the Circuit Court of Kanawha County, West Virginia, to be therein filed in the law suit of T. L. Kerse, Administrator of the estate of Thomas P. Barry, deceased, versus The Kanawha and Michigan Railway Company, in the notice hereto attached mentioned.

Given under my hand and official seal, this thirteenth day of May, 1913.

GEO. W. HAULENBEEK,
*Notary Public of the City of*
*Baltimore, State of Maryland.*

My Commission Expires May 1st, 1914.

STATE OF MARYLAND,
*City of Baltimore, ss:*

187 I, George W. Haulenbeek a Notary Public in and for the City and State aforesaid, do hereby certify that the above named S. R. Barr was by me first duly sworn, and that the depositions by him subscribed as above set forth, was reduced to writing by me and signed by the witness in my presence. That the same was taken at the time and place in the annexed notice specified, and that the fee bill hereto annexed is correct.

Given under my hand and official seal this thirteenth day of May, 1913.

GEO. W. HAULENBEEK,
*Notary Public of the City of*
*Baltimore, State of Maryland.*

My Commission Expires May 1st, 1914.

### Fee Bill.

| | |
|---|---|
| To taking depositions one hour | .75 |
| Witness, one day | 1.00 |

All costs paid by the defendant.

### *Notice to Take Depositions.*

To T. L. Kerse, Admr. of the estate of Thomas P. Barry, deceased:

Take Notice: That on the 13th day of May, 1913, at the Office of the General Counsel of the Baltimore & Ohio Railroad Company, in the Baltimore & Ohio General Office Bldg., in the City of Baltimore, Maryland, between the hours of 9 A. M. and 6 P. M., of that date, the undersigned will proceed to take the deposition of Dr. S. R. Barr to be read as evidence in its behalf in a certain law suit pending in the Circuit Court of Kanawha County, West
188 Virginia, wherein you are plaintiff and it is defendant.

If from any cause the taking of said depositions be not commenced, or if commenced be not concluded on that day, the taking thereof will be adjourned from day to day or from time to time, at the same place and between the same hours until the same shall be completed.

Witness the following signature this 2nd day of May, 1913.

THE KANAWHA & MICHIGAN RAILWAY COMPANY,
By W. N. KING &
LEROY ALLEBACH,
*Its Attorneys.*

### *(Return.)*

Executed the within process on the within named T. E. Kerse, admr., on the 2 day of May, 1913, by delivering to him in person, an office copy ther-of.

BONNER H. HILLS, *S. K. C.*,
By ——— ———.

### "DEFENDANT'S EX. A."

### Baltimore and Ohio Railroad Co., Relief Department.

### *Application for Full Membership in the Relief Feature.*

To the Superintendent of the Relief Department:

I, Thomas Barry, of Martinsburg in the County of Berkeley and State of W. Va., employed in the service of the Baltimore and Ohio Railroad Company, as Brakeman in the Conducting Transportation Department Cumberland Division, do hereby, as one of the conditions of such employment, apply for membership in the Relief

189 Feature, and consent and agree to be bound by all the Regulations of the Relief Department now in force, and by any other Regulations of said Department hereafter adopted, applicable to the Relief Feature; for which Regulations now in force reference is hereby had to any copy of the last edition of the book of Regulations of said Department, issued by the Superintendent.

I Also Agree that the said Company, by its proper agents and in the manner provided in said Regulations, shall apply monthly, in advance, from the first wages earned by me under said employment, in each calendar month, sums at the rate of 2.00 per month as a contribution to the Relief Feature of said Department, for the purpose of securing the benefit provided by said Regulations, for a member of Class B to myself, or in the event of my death to my mother Mary Martinsburg W. Va. or to whomever I may hereafter from time to time designate in writing by way of substitution, with the written consent of the Superintendent; or, if no such beneficiary be then living, to my next of kin (as determined by the laws of the State of Maryland), in accordance with Regulation No. 18—subject to all the provisions and requirements of said Regulations.

I expressly stipulate that my marriage shall ipso facto have the effect to substitute my wife in the place and stead of the beneficiary named above to receive said benefits in the event of my death, if she be then living, except as to children by a former marriage who may be named as beneficiaries, and in that event my said wife shall have one-half of said benefits.

190 I further agree that this application, when accepted by the Superintendent, shall constitute a contract between myself and the said Company, as a condition of my employment by the Company, governed in its construction and effect by the laws of the State of Maryland, and as such be an irrevocable power and authority to said Company to appropriate the above amounts from my wages and apply the same as aforesaid, and shall constitute an appropriation and assignment in advance to the said Company, in trust for the purposes of the Relief Feature, of such portions of my wages, which assignment shall have precedence over any other assignment by me of my wages or of any claim upon them on account of liabilities incurred by me.

I further agree that in consideration of the contributions of said Company to the Relief Department, and of the guarantee by it of the payment of the benefits aforesaid, the acceptance of benefits from the said Relief Department for injury or death, shall operate as a release of all claims against said Company or any company owning or operating its branches or divisions, or any company over whose railroad, right of way or property the said The Baltimore & Ohio Railroad Co. shall have the right to run or operate its engines or cars or send its employes in the performance of their duty, for damages by reason of such injury or death, which could be made by or through me; and that the Superintendent may require, as a condition precedent to the payment of such benefits, that all acts by him deemed appropriate or necessary to effect the full release and dis-

charge of the said companies from all such claims, be done by
191 those who might bring suit for damages by reason of such injury or death; and also, that the bringing of such a suit by me, my beneficiary or legal representative, or for the use of my beneficiary alone or with others, or the payment by any of the companies aforesaid of damages for such injury or death recovered in any suit or determined by compromise, or of any costs incurred therein, shall operate as a release in full to the Relief Department of all claims by reason of my membership therein.

I also agree, for myself and those claiming through me, to be specially bound by Regulation No. 11, providing for the final and conclusive settlement of all disputes by reference to the Superintendent of the Relief Department, and an appeal from his decision to the Committee on the Relief Department.

I understand and agree that this application, when accepted by the Superintendent, shall constitute a contract between me and the said Company by which my rights as a member of said Relief Feature and as an employe of said Company shall be determined as to all matters within its scope; that each of the statements herein contained and each of my answers to the questions asked by the Medical Examiner and hereto annexed, shall constitute a warranty by me, the truth whereof shall be a condition of payment of the benefits aforesaid.

I hereby certify that I am 31 years of age; am correct and temperate in my habits and have no injury or disease, constitutional or other, which will tend to shorten my life; and am now in good health and able to earn a livelihood.

192 In witness whereof, I have signed these presents at Martinsburg, in the State of W. Va., this 23 day of January, 1904.

THOMAS BARRY. [SEAL.]

Witness:
J. A. DORMER.

I certify that the foregoing form has been read to the person whose mark I herewith witness.

The foregoing application is accepted at the office of the Superintendent of the Relief Department, Relay, Maryland, this 25 day of Jan. 1904.

S. R. BARR,
*Superintendent of Relief Department.*

In the Circuit Court of Kanawha County, W. Va.

(T. L. Kerse, Admr. of the Estate of Thos. P. Barry, Plaintiff,
vs.
The Kanawha and Michigan Ry. Co.

Defendant's Exhibit "A." Geo. W. Haulenbeek, Notary Public.

*Questions to be Asked the Applicant by the Medical Examiner.*

1. Were you ever before employed by either the Baltimore & Ohio, Pitts. & Western, Pitts. Junct., or Clev. Term'l & Valley R. R. Co.'s; if so, by what Co., how employed, and in what Department and Division? No.

2. Have you ever been rejected for life insurance by any life insurance company or beneficial association? If so, why, when and where? No.

3. Have you now any infirmity or weakness, tending to impair your health, or do you know of any reason why you should not be accepted? No.

193 4. Have you been vaccinated? No. 5. Date of birth? Oct. 26, 1872.

6. Were you ever married? No. 7. Give names and ages of children by present or previous marriage separately. If any of them married, give their present names: ........ ..................

8. Father alive, aged .... Father died, aged 71 of Bright's Dis.

9. Mother alive, aged 70. Mother died aged .... of ..........

10. Of brothers and sisters—how many dead above 14 years of age—at what age and of what disease? Original Number 7. Number dead 4. Age—— at death inf. Cause of death?............

11. If none of the above are living, state what other relatives, if any, are living, and give their addresses: ....................
.................................... ,.................

12. Have any near relatives died of consumption or decline, or been insane? No.

13. Have you ever been laid up from work or in hospital through illness or accident, and if so, for what, when and how long? No.

*Certificate of Medical Examiner.*

14. Have you carefully read the questions to applicant? Yes.

15. Pulse—number per min. and character 80 reg.

16. Measurement of chest—forced expiration 33 ins.; forced inspiration 36 ins.; measurement of abdomen 31 inches.

17. Is the character of the inspiration full, easy and regular, and the murmur clear and distinct over both lungs? Yes.

18. Is there entire absence of indication of disease of the organs of respiration or their appendages? Yes.

19. State number of respirations per minute 16.

194 20. Is the character of the heart's action uniform, free and steady? Yes. 21. Are the valvular sounds healthy? Yes.

22. Is there entire freedom from indications of diseases of this organ or of the blood vessels? Yes.

23. Have you made careful ausculation and percussion of the thorax? Yes.

24. Head and neck—is there facial paralysis, plypus, scars or glandular abscesses? No. 25. Mouth and throat—secondary disease, enlarged tonsils, serious defect in speech? No. 26. Chest, flat or narrow, flattening from pleurisy, humpback? No. 27. Abdomen—hernia, scars of old syphilis, varicocele, enlarged test-es, piles, fistula? No. 28. Limbs—varicose veins, ulcers or scars from, swelling of ankles? No. 29. Skin—syphilis and its results, rupia, lepra, psoriasis? No.

30. Do you consider the applicant to be habitually free from tendency to cough, difficulty of breathing, palpitation of the heart or disease of the spine, kidney or bladder? Yes. 31 In your opinion is the applicant temperate? Yes.

32. From your personal examination, do you believe each of the applicant's answers to be true and full? Yes.

33. State what deformities, if any, exist, or anything discovered by you which influences the character of the risk, and which is not set forth in the answers. None.

34. What, in your opinion, is the applicant's prospect for longevity? Good.

35. Do you recommend this risk? Yes.

195 Acuteness of vision. The number of the series seen at 20 feet distant—Right Eye, 20/20. Left Eye, 20/20.

Range of Vision—Least and greatest number of inches at which type D-O. 5 on test type can be read: Right Eye—Least 5 inches, Greatest 20 inches. Left Eye—Least 5 inches. Greatest 20 inches. Good or Defective—Good.

Hearing good.

Color Sense—Selection Prompt.

| Test skin submitted. | Name given. | Numbers selected to match. |
|---|---|---|
| A—Green. | Green | 1 to 19 |
| B—Rose. | Pink | 21 to 27 |
| C—Red. | Red | 31 to 37 |

Second Color Test.

| Flag shown. | Name and use given. | Numbers selected. |
|---|---|---|
| —— | —— | —— |

Third Color Test.

| Number shown. | Name given. | Numbers selected. |
|---|---|---|
| —— | —— | —— |

Remarks.............................................

I certify that the answers to the above questions are in my own handwriting, and that I have made privately a careful examination of this person who has subscribed his name to the preceding application, and am of opinion that he is — in good health, — of sound constitution and — physically qualified to perform the duties
196 of the place he seeks in the railroad service.

J. O. DOEVNER,
*Med. Examiner.*

Place and date, Mbg. Jany. 23/04.

*Notice to Take Depositions.*

To T. L. Kerse, Admr. of the estate of Thomas P. Barry, deceased:

Take Notice: That on the 22nd day of May, 1913, at the Office of Enslow, Fitzpatrick, Alderson & Baker, in the City of Huntington, West Virginia, between the hours of 9 A. M. and 6 P. M., of that day, the undersigned will proceed to take the depositions of sundry witnesses to be read as evidence in its behalf in a certain law suit pending in the Circuit Court of Kanawha County, West Virginia, wherein you are plaintiff and it is defendant.

If from any cause the taking of said depositions be not commenced, or if commenced be not concluded on that day, the taking thereof will be adjourned from day to day or from time to time, at the same place and between the same hours until the same shall be completed.

Witness the following signature this 19th day of May, 1913.

THE KANAWHA & MICHIGAN
RAILWAY COMPANY,
By LEROY ALLEBACH &
W. N. KING,
*Its Attorneys.*

*(Return.)*

Executed the within process on the within named T. L. Kerse, Admr. on the 2 day of May, 1913, by delivering to him in person, an office copy ther-of.

BONNER H. HILL, *S. K. C.*

197 The taking of the within Depositions is hereby continued from the 22 day of May, 1913, to the 23 day of May 1913, at the same place and between the same hours as specified in said notice.

Given under my hand this 22 day of May 1913.

L. L. McCLURE,
*Notary Public.*

My Commission expires April 10, 1923.

## *Caption.*

Depositions of sundry witnesses, taken before me, L. L. McClure, a Notary Public within and for the County of Cabell, in the State of West Virginia, pursuant to the annexed notice, and at the time and place therein specified, to be read in evidence on behalf of the defendant in an action pending in Circuit Court of Kanawha County, West Virginia, in which T. L. Kerse, admministrator of the estate of Thomas P. Barry, deceased, is plaintiff, and The Kanawha & Michigan Railway Company is defendant; no one being present on behalf of plaintiff, and Leroy Allebach on behalf of the defendant.

Mrs. Myrtle Wigley, a witness of lawful age, being first duly sworn, deposes and says:

Q. Give your name and residence.

A. Mrs. Myrtle Wigley, residence, Huntington, W. Va.

Q. Did you know Thos. P. Barry, in his lifetime, if so, how long?

A. I did for about seven years before his death.

Q. Where did you first meet him?

A. In Cumberland, Md.

Q. What was he doing then?

A. He was Yard Brakeman on the B. & O. R. R.

198 Q. How did you get acquainted with him?

A. He roomed at my house and was a friend of quite a number of friends of mine.

Q. How well did you know him and what do you know about his personal habits regarding drinking wearing good clothes etc?

A. He drank all the time and dressed very well. I knew him very well and know that he spent everything he made in the ways I have told.

Q. About how much was he making per month?

A. From $90.00 to $110.00 per month.

Q. What did he tell you about his wife and son in Washington, D. C.?

A. He told me he had been married, but had separated from his wife and that she had remarried, but he never mentioned having a son.

Q. How did Mr. Barry contribute to the support of his former wife and his son in Washington and upon what do you base your answer?

A. He did not support them at all because he spent all his money on himself and said he had no wife as she had remarried.

Q. Did he tell you these things?

A. Yes sir.

Q. What were Mr. Barry's financial circumstances after he came to Charleston, W. Va.?

A. He had no money at all, he borrowed money from me.

Q. What was he doing in Charleston, when you first knew him there?

A. He was working as chauffeur and repairing automobiles, but he was never paid for this as he was working for a taxi-cab
199 company which failed and when he was killed he had a suit pending against them for wages which had never been paid.

Q. At the time of his death, how was he contributing to the support of his former wife and son in Washington?

A. He could not have supported them in any way as he even left an unpaid board bill and owed me for room rent.

And further this deponent saith not.

MYRTLE WIGLEY.

THE STATE OF WEST VIRGINIA,
*Cabell County, ss:*

I, L. L. McClure, a Notary Public in and for the County and State above-named, duly commissioned and qualified, do hereby certify that the above named Myrtle Wigley was by me first sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by her subscribed as above set forth, was reduced to writing by J. Wm. Hagen, Jr., and was subscribed by the said witness in my presence, and was continued from day to day, as above set forth, that said deposition was duly taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached, and that I am not Counsel, Attorney or relative of either party, or otherwise interested in the event of this suit; and was at the time of so taking the said deposition a Notary Public duly commissioned for the County of Cabell and State of West Virginia.

In testimony whereof, I have hereunto set my hand and official seal, this 23 day of May A. D. 1913.

[SEAL.] L. L. McCLURE,
*Notary Public, Cabell Co., W. Va.*

My commission expires April 10, 1923.

200 *Cost Bill.*

| | |
|---|---|
| Writing and Certifying Depositions, at 75 cents per hour | $2.00 |
| Swearing witnesses | 1.00 |
| Total cost of taking Depositions | $3.00 |

Received of Leroy Allebach the sum of $3.00 in full of my fees, as above specified, and also $ —— in full of Constable's fees. The witnesses were paid their fees by Leroy Allebach.

L. L. McCLURE,
*Notary Public, Cabell County, W. Va.*

My commission expires April 10, 1923.

And which evidence, depositions, motions and rulings of the Court, objections and exceptions of counsel to such rulings are by defendant prayed to be certified, signed, sealed and saved to it, and be made a part of the record, which is accordingly done, and for identification is marked "Bill of Exceptions No. 1."

And the Court certifies that the foregoing is all of the evidence adduced upon the trial of the case, together with motions made by counsel, the rulings of the Court as to the admission and rejection of evidence and on said motions, all of which is noted in the transcript of said evidence, as well as all of the exhibits, motions, objections and exceptions of counsel both for the plaintiff and the defendant as to the rulings of the Court.

[SEAL.]

SAM D. LITTLEPAGE,
*Judge of the Circuit Court*
*of Kanawha County, W. Va.*

201 (Bill of Exceptions No. 2 referred to in the foregoing order is in the words and figures following, to-wit.)

*Bill of Exceptions No. 2.*

T. L. Kerse, Admr., etc., Plaintiff,
vs.
The Kanawha & Michigan Railway Company, a Corporation, Defendant.

(Trespass on the Case.)

Be it remembered that upon the trial of the above entitled case, after all the evidence had been introduced both by the plaintiff and the defendant, the defendant presented to the Court and asked to be given to the jury the following instructions, to-wit:

### Instruction No. 1.

The Court instructs the jury that the evidence in this case is insufficient to authorize a verdict in favor of the plaintiff, and directs the jury to return a verdict in favor of the defendant.

### Instruction No. 2.

The Court instructs the jury that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of The Kanawha & Michigan Railway Company, where his duty required him to pass under said piece of timber, then said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by 202 said piece of timber, and there can be no recovery by the plaintiff herein.

### Instruction No. 3.

The Court instructs the jury that before the plaintiff is entitled to recover in this case, he must prove, by preponderance of the evidence, that John Thomas Barry was dependent in whole or in part upon Thomas P. Barry.

### Instruction No. 4.

The Court instructs the jury that in this case the damages recoverable are limited to such pecuniary loss as have resulted to John Thomas Barry, by reason of the wrongful death of Thomas P. Barry, and that the damage is limited strictly to the financial loss thus sustained.

### Instruction No. 5.

The Court instructs the jury that unless they find from the evidence that John Thomas Barry, for whose benefit this suit was brought, was actually damaged financially by the death of Thomas P. Barry, they should find for the defendant.

### Instruction No. 6.

The Court instructs the jury that in arriving at the amount of damages, if any, to be awarded to plaintiff in this case, the jury must take into consideration the evidence relative to the character and habits of Thomas P. Barry, and the probability of his contributing anything to the support of John Thomas Barry, and unless they find that Thomas P. Barry was contributing to the support of John Thomas Barry, or John Thomas Barry could reasonably 203 have expected Thomas P. Barry to contribute to his support, they must find for the defendant.

### Instruction No. 7.

The Court instructs the jury that if you find from the evidence that Thomas P. Barry came to his death by reason of his own negligence and not by reason of the negligence of the railway company, then your verdict must be for the defendant in this case.

### Instruction No. 9.

The Court instructs the jury that uncontradicted testimony is to be taken as true.

To the giving of said instructions, and to each of them, plaintiff objected, and the Court overruled said objection as to each of said instructions, except instructions Nos. 1, 2 and 9, and to the action of the Court in overruling said objection, the plaintiff objected and excepted; and the Court refused to give instructions Nos. 1, 2 and 9, to which action of the Court in refusing to give said instructions Nos. 1, 2 and 9, the defendant objected and excepted, and prayed that this, its bill of exceptions, be signed, sealed and saved to it, and be made part of the record, which is accordingly done, and for identification is marked "Bill of Exceptions No. 2."

SAM D. LITTLEPAGE. [SEAL.]
*Judge of the Circuit Court of Kanawha County, W. Va.*

203½–225 *"Interrogatories Given S. D. L., Judge."*

### Interrogatory No. 1.

Q. Did Thomas P. Barry, at the time of the accident, know that the piece of timber was stretched across and over the defendant's track?

Answer. No.

### Interrogatory No. 2.

Q. Did Thomas P. Barry, at the time of the accident, know that the piece of timber, across the track at Kanawha Brewing Company, was so low that it would not clear him standing upon the top of a box car?

Answer. No.

### Interrogatory No. 3.

Q. Was Thomas P. Barry, at the time of his death, engaged in Interstate Commerce or commerce between two or more states, or was he engaged in commerce wholly within the State of West Virginia.

Answer: Interstate commerce.

W. A. TULLY, *Foreman.*

* * * * * * *

226 STATE OF WEST VIRGINIA,
*County of Kanawha, ss*:

I, Ira H. Mottesheard, Clerk of the Circuit Court for said County and in said State, do hereby certify that the foregoing is a true, full and complete transcript in the case of T. L. Kerse, Administrator of the estate of Thomas P. Barry, deceased, against the Kanawha & Michigan Railway Company, a corporation.

Given under my hand and the seal of said Court this 2nd day of Oct., 1913.

[Seal Circuit Court, Kanawha County, West Virginia.]

IRA H. MOTTESHEARD,
*Clerk Kanawha Circuit Court.*

Transcript $56.75.

227 STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, Thursday, February 12, 1914, the following order was made and entered, to-wit:

T. L. KERSE, Adm'r, etc.,
vs.
THE KANAWHA & MICHIGAN RAILWAY COMPANY.

For reasons appearing to the Court, the order heretofore entered in this case on this day is set aside and held for naught, and now this day *came* the Kanawha & Michigan Railway Company, a corporation, by Leroy Allebach, and W. N. King, its attorneys, and presented to the Court a petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Kanawha County, rendered on the 2nd day of August, 1913, in a case in which T. L. Kerse, administrator of the estate of Thomas P. Barry, deceased, was plaintiff, and said petitioner was defendant, with a transcript of the record of the judgment aforesaid accompanying the petition, which being seen and inspected by the Court, the writ of error and supersedeas prayed for is refused, the Court being of opinion that the judgment complained of is plainly right.

And the plaintiff herein having expressed a desire to present a petition to the Supreme Court of the United States for a writ of error and supersedeas to the order of this Court, it is hereby ordered that the execution of this order be suspended for the period of ninety days from the end of this term, provided the plaintiff herein shall give bond before the Clerk of this Court, with good and sufficient security, in the sum of Three Hundred Dollars, conditioned for the payment of all such damages as any person may sustain by reason of said suspension, in case a supersedeas to this order should
228 not be allowed by the Supreme Court of the United States.

The petition is as follows:

229 In the Supreme Court of Appeals of West Virginia.

T. L. KERSE, Adm'r of the Estate of Thomas P. Barry, Deceased, Appellee,
vs.
THE KANAWHA & MICHIGAN RAILWAY COMPANY, Defendant, Appellant.

*Petition for Writ of Error and Supersedeas.*

To the Honorable Judges of the Supreme Court of Appeals of West Virginia:

Your Petitioner, The Kanawha & Michigan Railway Company, a corporation, respectfully represents that it is aggrieved of a judgment rendered by the Circuit Court of Kanawha County, West Virginia, August 2nd, 1913, in the above entitled action.

Your Petitioner files herewith and makes part of this petition a transcript of the record in said action, and respectfully represents that the Circuit Court erred:

(1) In overruling your Petitioner's demurrer to the declaration filed in said action.

(2) In sustaining the motion of plaintiff to strike out and reject the plea of res adjudicata filed in this case.

(3) In allowing to go to the jury, over the objection of this Petitioner, defendant below, certain evidence offered by the plaintiff.

230 (4) In refusing to allow to go to the jury certain evidence offered by this Petitioner, defendant below.

(5) In overruling your Petitioner's motion to strike out the evidence of plaintiff and direct a verdict for the defendant, made after the introduction of plaintiff's evidence.

(6) In overruling the motion of defendant, made after the close of all the evidence, to direct a verdict for the defendant.

(7) In refusing to give to the jury Instructions Nos. 1, 2 and 9, offered by the defendant.

(8) In refusing to set aside the verdict of the jury, as being contrary to the law and the evidence, and to grant the defendant a new trial.

(9) In refusing to render judgment for the defendant, notwithstanding the verdict of the jury.

(10) The answers given by the jury to Interrogatories Nos. 1 and 2 are contrary to the uncontradicted evidence in the case and show a prejudice in favor of plaintiff and against the defendant below.

(11) The verdict of the jury is contrary to the evidence and shows a prejudice in favor of plaintiff and against the defendant below.

(12) That said verdict is against the right, privilege and immunity, especially set up and claimed by defendant below, under the constitution, statutes and laws of the United States.

(13) That the court below erred in refusing to apply the laws of the United States to the situation of the parties in this action, to-wit:

That defendant below claimed a right, privilege and immunity from liability upon the ground and for the reason that a certain federal statute, namely, that act commonly known as Employers' Liability Act of Congress of April 22, 1908, applies to the 231 situation of the parties to the exclusion of any and all legislation of the State of West Virginia upon the same subject, and that under the provisions of said Act the plaintiff's decedent assumed the risks incident to the situation whereof plaintiff complained, providing he knew or ought to have known of the same; that said claim of defendant below was denied by the court and is denied by the verdict herein complained of, and the decision is against the right, privilege and immunity so especially set up and claimed by defendant below as aforesaid.

(14) Others errors are apparent upon the record operating to the prejudice of the defendant below.

Your Petitioner, therefore, prays that a writ of error and supersedeas to said judgment may be granted, and that the said judgment may be reviewed by this Court, and, as in duty bound, it will ever pray, etc.

THE KANAWHA & MICHIGAN
RAILWAY CO.,
By LEROY ALLEBACH AND
W. N. KING,
*Its Attorneys.*

232 I, Leroy Allebach, an attorney practicing in the Supreme Court of Appeals of the State of West Virginia, do hereby certify that, in my opinion, it is proper that the said Court should review the judgment complained of in the foregoing petition.

LEROY ALLEBACH.

December 31st, 1913.

STATE OF WEST VIRGINIA, *To-wit:*

The writ of error and supersedeas prayed for in the foregoing petition was refused in Court at Charleston on the 12 day of Feb. 1914.

Attest:

WM. B. MATHEWS,
*Clerk Supreme Court of Appeals.*

233 Supreme Court of Appeals of West Virginia.

STATE OF WEST VIRGINIA, *To-wit:*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of the State of West Virginia, do hereby certify that the foregoing is a true, correct and complete transcript of the record filed in this Court upon the application for writ of error and supersedeas from the Circuit Court of Kanawha County, West Virginia, and also a true, correct and complete transcript of the entries and orders of the Supreme Court of Appeals of West Virginia, filing said petition for writ of error and supersedeas and denying the application of The Kanawha & Michigan Railway Company for such writ of error and supersedeas, in the case of T. L. Kerse, Adm'r of the estate of Thomas P. Barry, deceased, vs. The Kanawha & Michigan Railway Company, lately pending in the Circuit Court of Kanawha County, West Virginia, as fully as the same appears of record and on file in my said office.

Given under my hand and the official seal of said Court, at Charleston, this 21st day of February, 1914, and in the 51st year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
*Clerk Supreme Court of Appeals*
*of West Virginia.*

234 (Copy.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judge of the Circuit Court of Kanawha County, State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between T. L. Kerse, Administrator of the Estate of Thomas P. Barry, deceased, plaintiff, and The Kanawha & Michigan Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, 235 right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said defendant, The Kanawha & Michigan Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fifth day of March, in the year of our Lord one thousand nine hundred and fourteen.

(Signed) JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

Allowed by—
(Signed) EDWARD D. WHITE,
*Chief Justice of the United States.*

236 Know all men by these presents, That we, The Kanawha & Michigan Railway Company, Principal, and American Surety Company of New York, Surety, are held and firmly bound unto T. L. Kerse, Administrator of the estate of Thomas P. Barry, deceased, in the sum of twenty five hundred dollars ($2,500.00) to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 25th day of March, 1914.

The condition of the above obligation is such, That Whereas, The Kanawha & Michigan Railway Company hath prosecuted its writ of error to the Supreme Court of the United States to reverse a certain judgment rendered by the Circuit Court of Kanawha County, on the 2nd day of August, 1913, from which said judgment the Supreme Court of Appeals of West Virginia refused an appeal on the 13th day of February, 1914, wherein said The Kanawha & Michigan Railway Company was defendant and T. L. Kerse, Adm'r of the estate of Thomas P. Barry, deceased, was plaintiff.

Now, therefore, the condition of the above obligation is such, That if the above named The Kanawha & Michigan Railway Company, plaintiff in error, shall prosecute its said writ of error to effect, and answer and pay all costs and damages that may be adjudged, if it shall fail to make good its plea, then this
237 obligation to be void, otherwise to remain in full force and effect.

THE KANAWHA & MICHIGAN RAILWAY CO.,
By W. N. KING,
*Its Attorney-in-Fact.*
AMERICAN SURETY COMPANY OF NEW YORK.
By CLAUDE B. BROWN,
*Resident Vice-President.*

Attest:
PAUL N. CHERRY,
*Resident Assistant Secretary.*

The above bond is approved this 25th day of March, 1914, to operate as a supersedeas.

EDWARD D. WHITE. [SEAL.]
*Chief Justice of the United States.*

### *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual stockholders' meeting was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 20, 1914, at eleven o'clock A. M.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 9, 1913, for the purpose of nominating * * * officers of the Company, * * * for the *u*nsuing year and until their
238 successors are elected, beg leave to report as follows:

"We nominate for * * *

| Place. | Resident vice-presidents. | Resident assistant secretaries. |
|---|---|---|
| Washington, D. C. | H. J. Finley. | H. J. Finley. |
| | L. Bert Nye. | L. Bert Nye. |
| | Robt. H. Young. | Robt. H. Young. |
| | S. Hazen Bond. | Claude B. Brown. |
| | Nathan B. Scott. | Paul N. Cherry. |
| | J. D. Maynes. | Fred G. Rose. |
| | Claude B. Brown. | |

"Whereupon, it was * * *

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
*County of New York, ss:*

239 I, Jacob Pfeiffer, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 30th day of January, 1914.

[SEAL.] JACOB PFEIFFER,
*Assistant Secretary.*

STATE OF NEW YORK,
*County of New York, ss:*

H. M. Goff being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said

Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Com-
240 pany, and is duly qualified to act as surety under such laws.

That said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

H. M. GOFF.

Subscribed and sworn to before me this 15th day of Jan., 1914.

E. MURRELL. [SEAL.]
*Notary Public, New York County, No.* 1058.

Register's office, New York County, No. 5015.
Certificate filed in all counties.

241 UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of Kanawha County, W. Va.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in both the Circuit Court of Kanawha County, W. Va., and in the Supreme Court of Appeals of West Virginia, in the within entitled cause, wherein T. L. Kerse, Admr. of the estate of Thomas P. Barry, deceased, was plaintiff, and The Kanawha & Michigan Railway Company was defendant, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Circuit Court of Kanawha County, West Virginia, in the City of Charleston, this 10 day of April, 1914.

[Seal Circuit Court, Kanawha County, West Virginia.]

IRA H. MATTESHEARD,
*Clerk of the Circuit Court of*
*Kanawha County, W. Va.*

Costs of Suit.

Plaintiff ............... $—
Defendant ............. $—

Attest:

—— ——, *Clerk.*

242 & 243 UNITED STATES OF AMERICA, *ss:*

To T. L. Kerse, Administrator of the Estate of Thomas P. Barry, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washingon, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of Kanawha County, State of West Virginia, wherein The Kanawha & Michigan Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this twenty-fifth day of March, in the year of our Lord one thousand nine hundred and fourteen.

EDWARD D. WHITE,
*Chief Justice of the United States.*

Service of the above citation is hereby accepted this 7th day of April, 1914.

T. L. KERSE,
*As Admr. of the Estate of Thos. P. Barry, Deceased,*
By CATOR & BLEDSOE,
*His Attorneys.*

244 The Supreme Court of the United States.

At Law.

T. L. KERSE, Admr. of the Estate of Thomas P. Barry, Deceased, Plaintiff,

vs.

THE KANAWHA & MICHIGAN RAILWAY COMPANY, Defendant.

*Petition for Writ of Error.*

To the Honorable the Justices of the Supreme Court of the United States:

Comes now the above named The Kanawha & Michigan Railway Company, a corporation, and says:

That on the 2nd day of August, 1913, an order in this case was entered by the Circuit Court of Kanawha County, West Virginia, against it, The Kanawha & Michigan Railway Company, and that the said order was final; and that thereafter, on the 13th day of February, 1914, proper petition for appeal from said Circuit Court of Kanawha County was presented to the Supreme Court of Appeals of West Virginia, the highest court in the said state, and that the

said petition was considered, and, on the 13th day of February, 1914, the said appeal prayed for was refused by the said Supreme Court, and by the said action of the said Supreme Court in denying said writ of error, the judgment of the Circuit Court of Kanawha County became final, and the said Kanawha Circuit Court was the highest court of the State of West Virginia to which the case could be carried, and in which a decision in the suit could be had. That the said The Kanawha & Michigan Railway Company is aggrieved that in the said judgment, and in the proceedings
245 had prior thereto in this case, certain errors were committed to its prejudice; that this is an action involving directly that certain Act of the United States Congress, known as Federal Employers' Liability Act, passed April 22nd, 1908, and amendments thereof, all of which will more fully appear in detail from the assignments of error filed herein, and that this petitioner set up and relied upon in the trial of said action all the rights, privilege and immunity which could properly be claimed under and by virtue of the provisions of said statute, and the decision of said Kanawha Circuit Court is against the right, privilege and immunity, especially set up and claimed by this petitioner in said Court.

Wherefore, your petitioner, the said The Kanawha & Michigan Railway Company, presents herewith an exemplified transcript of the record of this case, both in the Supreme Court of Appeals of West Virginia and in the said Circuit Court of Kanawha County, West Virginia, and prays that a writ of error to said Circuit Court be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided both bond and writ of error may operate — a supersedeas, that the errors complained of in the assignments of error herewith filed may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Circuit Court of Kanawha County, West Virginia, be reversed.

W. N. KING &
LEROY ALLEBACH,
*Attorneys for The Kanawha & Michigan Railway Company, Petitioner.*

246 [Endorsed:] The Supreme Court of the United States. T. L. Kerse, Admr. of the estate of Thomas P. Barry, deceased, plaintiff, vs. The Kanawha & Michigan Railway Company, defendant. Petition for writ of error.

247 The Supreme Court of the United States.

At Law.

T. L. Kerse, Admr. of the Estate of Thomas P. Barry, Deceased,
Plaintiff,
vs.
The Kanawha & Michigan Railway Company, Defendant.

## *Assignments of Error.*

Now comes the complainant, The Kanawha & Michigan Railway Company, and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, decided by the Circuit Court of Kanawha County, West Virginia, on the 2nd day of August, 1913, which said Court is the highest Court in the State of West Virginia in which said case could be heard and determined, and in which a decision in said suit could be had, because the Supreme Court of Appeals of West Virginia did, on the 13th day of February, 1914, refuse a writ of error and supersedeas to the judgment of the Circuit Court of Kanawha County; and the said complainant, The Kanawha & Michigan Railway Company, for the purpose of having the same reviewed by writ of error in the Supreme Court of the United States, makes the following assignments of error:

First. That the said Circuit Court erred in entering judgment on the verdict obtained by plaintiff herein, in that the said verdict was against the right, privilege and immunity, especially set up and claimed by defendant, under the constitution, statutes and laws of
the United States, under and by virtue of the Act of Con-
248 gress, known as Employers' Liability Act, passed April 22,
1908, under which Act the suit was brought and tried.

Second. That the said Circuit Court of Kanawha County erred in refusing to apply the laws of the United States to the situation of the parties to this action, and particularly denying to this Petitioner, defendant below, a right, privilege and immunity from liability, especially that referred to in Section 4 of the Act of Congress of April 22, 1908, commonly known as Employers' Liability Act, to-wit:

This Petitioner, defendant below, claimed a right, privilege and immunity from liability in this case upon the ground and for the reason that a certain Federal Statute, namely, that Act commonly known as Employers' Liability Act of Congress of April 22, 1908, and amendments thereof, applies to the situation of the parties to the exclusion of any and all legislation or law of the State of West Virginia upon the same subject, and that under the provisions of said Act, and particularly of Section 4 thereof, the plaintiff's decedent assumed the risks incident to the situation whereof plaintiff complained, providing he knew or ought to have known of the same, unless this Petitioner, defendant below, was guilty of the violation of some statute, enacted for the safety of employees, which violation contributed to the injury or death of such employee. That notwithstanding the fact that plaintiff's decedent was shown to have known of the dangers, and to have appreciated the same, the claim of this Petitioner, defendant below, was denied by said Court, and is denied by the verdict and judgment herein complained of, although this Petitioner, defendant below, especially set up and claimed the right, privilege and immunity from liability under the provisions of Section 4 of said Act of Congress of April 22, 1908, and that the decision of the Court is against the right, privilege and immunity so especially set up and claimed by defendant below, as aforesaid.

249 Your Petitioner says that no violation of any statute, enacted for the safety of employees, was alleged in the declaration or proved at the trial, and that, therefore, plaintiff's decedent should be held to have assumed the risks of injury as above stated.

Third. There is error apparent in the record, and in the decision of the Court and the judgment herein, in this, to-wit:

This action was brought under and by virtue of the Act of Congress, known as Employer's Liability Act, passed April 22, 1908, and amendments thereof, as appears from the first count in the declaration herein, and was tried under the provisions of said Act, as shown by the instructions of the Court to the jury and the finding of the jury that Barry was engaged in interstate commerce at the time of his death, and the undisputed testimony showed that Barry knew of and appreciated the dangers incident to the situation complained of in the declaration, and that your Petitioner, defendant below, requested the Court to give to the jury the following instruction, to-wit:

"The Court instructs the jury that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of The Kanawha & Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein."

Which instruction the Court refused to give to the jury, notwithstanding the fact that no violation of any statute, enacted for the safety of employees, was alleged in the declaration or proved
250 at the trial, and notwithstanding the fact that Section 4 of
said Act of Congress of April 22, 1908, commonly known as Employer's Liability Act, specially reserved to this Petitioner, defendant below, a right to rely upon the doctrine of assumed risk, and the right to have the jury instructed as requested by your petitioner, defendant below.

Your petitioner says that in requesting the Court to give to the jury the instruction copied herein, there was especially set up by your Petitioner, defendant below, a right, privilege and immunity from liability as claimed and provided under Section 4 of said Act of Congress of April 22, 1908, known as Employer's Liability Act, and that by the ruling of the said Circuit Court of Kanawha County, West Virginia, such right, privilege and immunity was denied your Petitioner, defendant below, and the decision is against the right, privilege and immunity so set up and claimed under the Constitution and laws of the United States above set forth.

Fourth. The Circuit Court of Kanawha County, West Virginia, erred in overruling your petitioner's demurrer to the declaration filed in said action in this, to-wit: That said action was based upon the provisions of the Employer's Liability Act, Act of Congress of April 22, 1908, and amendments thereof, and it appeared from the declaration that the accident resulting in the death of said Barry occurred on a private side-track of the Kanawha Brewing Company, and not upon the tracks of The Kanawha & Michigan Railway Company, your Petitioner, and that the obstruction over and above said side-track was placed there not by the Railway Company, your Petitioner herein, but by the said Brewing Company; that said obstruction was simply a temporary matter, necessary in the construction being done about said Brewery, and was not a part of the cars, engines, appliances, machinery, tracks, road-bed, works, boats, wharves or other equipment of the Railway Company, your Petitioner herein, and that your Petitioner, by its demurrer, re-
250½ lied upon a right, privilege and immunity from liability
under and by virtue of the Employer's Liability Act of Congress of April 22, 1908, and amendments thereof, and the decision of the Circuit Court of Kanawha County is against the validity of the right, privilege and immunity so especially set up and claimed by your Petitioner under and by virtue of said statute.

Fifth. The Circuit Court of Kanawha County, West Virginia, erred in sustaining the motion of the plaintiff to strike out and reject the plea of res adjudicata, filed by the defendant in this case, as appears in the facts set out in Bill of Exceptions No. 3, allowed by the Circuit Court of Kanawha County, West Virginia, wherein it appears that on the 20th day of May, 1912, T. L. Kerse, Administrator of the estate of Thomas P. Barry, deceased, sued out a certain writ or summons in case, and later, on the first Monday in August, 1912, said plaintiff filed in the office of the Clerk of the Circuit Court of Kanawha County, West Virginia, a certain declaration, fully set out in Bill of Exceptions No. 3, wherein it was sought to recover the sum of $10,000.00 from The Kanawha & Michigan Railway Company and the Kanawha Brewing Company on account of the death of said Thomas P. Barry, and under and by virtue of the laws of the United States in such case made and provided. That on September 20th, 1912, The Kanawha & Michigan Railway Company and the Kanawha Brewing Company, jointly and severally, demurred to the declaration and to each count thereof, which demurrer was at the time overruled, and to which overruling of the demurrer defendants excepted. Later, on the 26th day of February, 1913, said plaintiff asked leave to amend his declaration, as appears in the order entered

as of said date, and after all the desired amendments had been made, defendants, and each of them, demurred to said declaration and to each count thereof, which said demurrer was sustained. That on the same day, plaintiff further amended his declaration by strik-
251 ing out the second and third counts therein contained, and elected to rely solely upon the first count thereof, seeking to recover under and by virtue of the laws of the United States, more particularly known as Employer's Liability law, Act of Congress, passed April 22nd, 1908, and amendments thereof, and to the declaration, as so amended, The Kanawha & Michigan Railway Company further demurred, which demurrer was sustained, and upon motion of plaintiff the said cause was remanded to rules with leave to plaintiff to amend his declaration.

That plaintiff failed and refused to so amend his declaration, and that by reason of such refusal the judgment rendered upon said demurrer became final in said case in favor of said defendant.

That thereafter, to-wit, on the 8th day of March, 1913, the Kanawha County Circuit Court entered the following order:

"This day came the plaintiff by his attorneys, and it appearing to the Court that the defendants have appeared herein and that the plaintiff doth fail to prosecute his suit, on motion of the plaintiff, by his attorney, Henry S. Cato, it is ordered that the plaintiff be nonsuited, without prejudice, and pay to the defendants, besides their costs, $5.00 as allowed by statute."

That notwithstanding said final judgment in favor of The Kanawha & Michigan Railway Company in said case, said T. L. Kerse, Administrator of the estate of Thomas P. Barry, deceased, filed in the office of the Clerk of said Circuit Court, on or about the first Monday in March, 1913, a declaration, seeking to recover against said The Kanawha & Michigan Railway Company by reason of the death of said Thomas P. Barry, and under and by virtue of the laws of the United States, and more particularly of that certain Act of Congress of April 22nd, 1908, known as Employer's Liability Law, the sum of $10,000.00. That the Kanawha Brewing Company was not made a party to said suit, but that the plaintiff, defendant and the cause of action therein named and stated were the same in all respects as were named in the declaration filed on the first Monday in August, 1912, and the amendments thereto.

252 This defendant filed in the Circuit Court of Kanawha County its certain plea of res adjudicata, together with the certified record in the former suit of T. L. Kerse, Administrator of the estate of Thomas P. Barry, deceased, vs. The Kanawha & Michigan Railway Company, et al, praying judgment if the plaintiff ought to have or maintain his action against it, as fully appears in the record herein. That afterwards, to-wit, on May 26th, 1913, the plaintiff moved the court to strike out and reject said plea of res adjudicata, which motion the court sustained, to which action of the court in sustaining said motion the defendant objected and excepted.

And your Petitioner now alleges and contends that the judgment in the former case is a bar to the prosecution of the present case because of the judgment in favor of this defendant in said former case, and that said plaintiff ought not to have and maintain the present case, and the judgment therein rendered because of the facts above set out, and therefore prays this court to reverse said judgment herein and render judgment in favor of this Petitioner.

Sixth. The Circuit Court of Kanawha County, West Virginia, erred in refusing to set aside the verdict of the jury, as being contrary to the law and the evidence in this case, and to grant the defendant a new trial herein, as appears from the facts stated in assignments of error Nos. 1, 2, 3, 4 and 5 herein written.

Wherefore, for these and other manifest errors appearing in the record, the said The Kanawha & Michigan Railway Company, your Petitioner, prays that the judgment of the said Circuit Court of Kanawha County, West Virginia, may be reversed and set aside and held for naught, and that your Petitioner may have judgment granting it its just and lawful rights under the Constitution and the laws of the United States, and that it may be restored to all things which it has lost by this action and because of said judgment and decision of said Circuit Court of Kanawha County.

LEROY ALLEBACH AND
W. N. KING,
*Attorneys for the Kanawha & Michigan Railway Co., Petitioner.*

253 In the Supreme Court of the United States of America.

File No. 21467.

No. 129, October Term, 1915.

THE KANAWHA AND MICHIGAN RAILWAY COMPANY, Plaintiff in Error,

vs.

T. L. KERSE, Adm'r of the Estate of Thomas P. Barry, Deceased, Defendant in Error.

*Stipulation and Agreement.*

It is stipulated and agreed by and between the parties hereto that that portion of the record in this case, set out between pages 204 and 226 of the typewritten record filed in the office of the Clerk of the Supreme Court of the United States, may be omitted from the printed record to be prepared in this case.

The portion above referred to begins on page 204 and continues to page 226, the last words to be omitted being "Sam D. Littlepage, Judge of the Circuit Court of Kanawha County, West Virginia," and involves the plea of res adjudicata raised in the Court below, but which it is not desired to urge in the Supreme Court of the United States.

THE KANAWHA AND MICHIGAN RAILWAY COMPANY,
By LEROY ALLEBACH AND
W. N. KING,
*Attorneys.*
T. L. KERSE,
*Administrator of the Estate of Thomas P. Barry, Deceased.*
By CATO & BLEDSOE,
*Attorneys.*
G. A. BERRY,
*Att'y for Defendant.*

254 [Endorsed:] File No. 21467. In the Supreme Court of the United States of America. No. 129 October Term, 1915. The Kanawha and Michigan Railway Company, Plaintiff in Error, vs. T. L. Kerse, Admr. of the estate of Thomas P. Barry, deceased, Defendant in Error. Stipulation and Agreement. Office of the Clerk Supreme Court U. S. Received Sep. 13, 1915. Office of the Clerk Supreme Court U. S., Received Jul. 19, 1915. Office of the Clerk, Supreme Court U. S., Received Sep. 14, 1915.

255 [Endorsed:] File No. 24167. Supreme Court U. S. October Term, 1915. Term No. 129. The Kanawha & Michigan Railway Company, Pl'ff in Error, vs. T. L. Kerse, Adm'r, etc. Stipulation to omit parts of record in printing. Filed September 14, 1915.

Endorsed on cover: File No. 24,167. West Virginia, Kanawha County Circuit Court. Term No. 129. The Kanawha & Michigan Railway Company, plaintiff in error, vs. T. L. Kerse, administrator of the estate of Thomas P. Barry, deceased. Filed April 14, 1914. File No. 24,167.

6

No. 24,167

[illegible] Court, U. S.
FILED
NOV 24 1915
JAMES D. MAHER
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1915.

No. 129.

THE KANAWHA AND MICHIGAN RAILWAY COMPANY,
*Plaintiff in Error,*

vs.

T. L. KERSE, ADMINISTRATOR OF THE ESTATE OF THOMAS P. BARRY, DECEASED,
*Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE OF WEST VIRGINIA.

## BRIEF FOR PLAINTIFF IN ERROR.

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SPAHR & GLENN, PRINTERS, COLUMBUS, OHIO

No. 24,167

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IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE OF WEST VIRGINIA.

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT.

This is an action of trespass on the case, brought in the Circuit Court of Kanawha County, West Virginia, February 28, 1915, by T. L. Kerse, as Administrator of the estate of Thomas P. Barry, deceased, to recover damages from The Kanawha and Michigan Railway Company on account of the alleged wrongful death of Thomas P. Barry, a Brakeman, in Charleston, West Virginia, Yard of the Railway Company, on April 23, 1911.

The declaration, filed in March, 1913, alleges that The Kanawha and Michigan Railway Company is the owner and operator of a railroad extending from Gauley Bridge, West Virginia, to Corning, Ohio, and that said railway is a common carrier engaged in interstate commerce; that Thomas P. Barry was a Brakeman employed by the defendant in interstate commerce; that on April 23, 1911, the Kanawha Brewing Company operated a manufacturing plant at Charleston, connected with the railroad of defendant by a private side-track, which was served by The Kanawha and Michigan Railway Company "for the purpose of transporting the products of said Brewing Company to market and for other purposes." That some time prior to April 23, 1911, the Brewing Company had placed a certain piece of wood across the side-track, and extending from the Bottling House on one side of the side-track to another building on the other side of the side-track, at a height of about three feet above the top of an ordinary box car; that the Railway Company had notice of the presence of said piece of wood, but that Thomas P. Barry had no notice or knowledge of its presence. That the Railway Company wrongfully, carelessly and negligently allowed and permitted said obstacle to remain over the track, where the employees of the Railway Company were required to pass, and especially where Thomas P. Barry was required to pass in the due course of his employment. That as a result of the aforesaid facts, Thomas P. Barry was, on April 23, 1911, struck by and against said piece of wood and thrown from a box car, sustaining serious and fatal injuries. That he left surviving him a widow, who died before the filing of the declaration, and a son and child, John Thomas Barry, dependent upon Thomas P. Barry, in whose interest the action is prosecuted.

That the injuries resulting in decedent's death were received while he was engaged in interstate commerce, and while the Railway Company was engaged in interstate commerce, and by reason whereof damages are claimed in the sum of $10,000.00, "by virtue of the Statute of the United States in such case made and provided."

There is a second count, setting out generally the same facts, but not specifically alleging that the Railway Company and Barry were engaged in interstate commerce at the time of the accident. (Rec., pp. 2 to 5).

A plea of res adjudicata was filed by the defendant and overruled by the Court, but the Assignment of Error in this regard is not urged before the Supreme Court of the United States. See Record, pages 126-127.

A motion to dismiss, because of a non-suit theretofore taken, was also made and overruled, but no Assignment of Error is made on that account (Rec., p. 6).

The defendant demurred to the declaration and to each count thereof, which demurrer was overruled, and to which action of the Court the defendant objected and excepted (Rec., p. 6).

The defendant entered its plea of not guilty and issue was thereon joined (Rec., p. 6).

Upon trial, had in May, 1913, the defendant, after the introduction of plaintiff's evidence, moved the Court to arrest the evidence from the jury and to direct a verdict for the defendant, which motion was argued and overruled, to which ruling of the Court defendant objected and excepted (Rec., p. 45).

At the close of all the evidence, the Railway Company moved the Court to direct a verdict for the defendant, which motion was argued and overruled, to which ruling of the Court exception was noted by the Railway Company (Rec., p. 7).

After all the evidence had been introduced, defendant asked the Court to give to the jury certain Instructions, Nos. 1, 2 and 9 thereof being rejected by the Court, and exception was noted by the defendant to the refusal of the Court to give each of said Instructions, as appears in Bill of Exceptions No. 2, pages 110–111 of the Record.

The jury found for the plaintiff and assessed damages in the amount of $1,200, against the Railway Company (Rec., p. 7).

After verdict, the Railway Company filed its motion to set aside the verdict and for a new trial and for judgment notwithstanding the verdict of the jury, both of which motions were overruled by the Circuit Court on the 21st day of August, 1913, the defendant objecting and excepting to the overruling of said motions.

Subsequently, The Kanawha and Michigan Railway Company presented a petition for writ of error and supersedeas to the Supreme Court of Appeals of the State of West Virginia, which writ of error and supersedeas was refused February 12, 1914 (Rec., pp. 112–115).

Thereupon, on March 25, 1914, The Kanawha and Michigan Railway Company presented its petition for writ of error, with Assignment of Error, to Hon. Edward D. White, Chief Justice of the United States, which petition was allowed, and thereby the case comes into this Court (Rec., pp. 116–126).

## ASSIGNMENTS OF ERROR.

Assignments of Error still urged by plaintiff in error are as follows:

FIRST. That the said Circuit Court erred in entering judgment on the verdict obtained by plaintiff herein, in that the said verdict was against the right, privilege and immunity, especially set up and claimed by defendant, under the constitution, statutes and laws of the United States, under and by virtue of the Act of Congress, known as Employers' Liability Act, passed April 22, 1908, under which Act the suit was brought and tried.

SECOND. That the said Circuit Court of Kanawha County erred in refusing to apply the laws of the United States to the situation of the parties to this action, and particularly denying to this Petitioner, defendant below, a right, privilege and immunity from liability, especially that referred to in Section 4 of the Act of Congress of April 22, 1908, commonly known as Employers' Liability Act, to-wit:

This Petitioner, defendant below, claimed a right, privilege and immunity from liability in this case upon the ground and for the reason that a certain Federal Statute, namely, that Act commonly known as Employers' Liability Act of Congress of April 22, 1908, and amendments thereof, applies to the situation of the parties to the exclusion of any and all legislation or law of the State of West Virginia upon the same subject, and that under the provisions of said Act, and particularly of Section 4 thereof, the plaintiff's decedent assumed the risks incident to the situation whereof plaintiff complained, providing he knew or ought to have known of the same, unless this Petitioner, defendant below, was guilty of the violation of some statute, enacted for the safety of employees, which violation contributed to the injury or death of such employee. That notwithstanding the fact that plaintiff's decedent was shown to have known of the dangers, and to have appreciated the same, the claim of this Petitioner, defendant below, was denied by said Court, and is denied by the verdict and judgment herein complained of, although this Petitioner, defendant below, especially set up and claimed the right, privilege and immunity from liability under the provisions of Section 4 of said Act of Congress of April 22, 1908, and that the decision of the Court is against the right, privilege and immunity so especially set up and claimed by defendant below, as aforesaid.

Your Petitioner says that no violation of any statute, enacted for the safety of employees, was alleged in the declaration or proved at the trial, and that, therefore, plaintiff's decedent should be held to have assumed the risks of injury as above stated.

THIRD. There is error apparent in the Record, and in the decision of the Court and the judgment herein, in this, to-wit:

This action was brought under and by virtue of the Act of Congress, known as Employers' Liability Act, passed April 22, 1908, and amendments thereof, as appears from the first count in the declaration herein, and was tried under the provisions of said Act, as shown by the Instructions of the Court to the jury and the finding of the jury that Barry was engaged in interstate commerce at the time of his death, and the undisputed testimony showed that Barry knew of and appreciated the dangers incident to the situation complained of in the declaration, and that your Petitioner, defendant below, requested the Court to give to the jury the following Instruction, to-wit:

> "The Court instructs the jury that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of The Kanawha and Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein."

Which Instruction the Court refused to give to the jury, notwithstanding the fact that no violation of any statute, enacted for the safety of employees, was alleged in the declaration or proved at the trial, and notwithstanding the fact that Section 4 of said Act of Congress of April 22, 1908, commonly known as Employers' Liability Act, specially reserved to this Petitioner, defendant below, a right to rely upon the doctrine of assumed risk, and the right to have the jury instructed as requested by your Petitioner, defendant below.

Your Petitioner says that in requesting the Court to give to the jury the Instruction copied herein, there was especially set up by your Petitioner, defendant below, a right, privilege and immunity from liability as claimed and provided under Section 4 of said Act of Congress of April 22, 1908, known as Employers' Liability Act, and that by the ruling of the said Circuit Court of Kanawha County, West Virginia, such right, privilege and immunity was denied your Petitioner, defendant below, and the decision is against the right, privilege and immunity so set up and claimed under the Constitution and laws of the United States set forth.

FOURTH. The Circuit Court of Kanawha County, West Virginia, erred in refusing to set aside the verdict of the jury, as being contrary to the law and the evidence in this case, and to grant the defendant a new trial, as appears from the facts stated in Assignments of Error Nos. 1, 2 and 3 herein written.

The Fourth and Fifth Assignments of Error, set up in the Record, pages 124–125, are not urged in this Court (Rec., p. 126), and that numbered Sixth in the Record, page 126, is set out above as Fourth.

FIFTH. The Circuit Court erred in overruling the motion of the Railway Company (plaintiff in error here) to arrest the evidence from the jury and to direct a verdict in favor of the Railway Company, made at the close of plaintiff's evidence (Rec., p. 45).

SIXTH. The Circuit Court erred in overruling the motion of defendant (plaintiff in error here) to direct a verdict for the defendant, made after the introduction of all the evidence (Rec., p. 7).

SEVENTH. The Circuit Court erred in refusing to give to the jury Instruction No. 1, asked by the defendant (plaintiff in error here) at the close of all the evidence.

> "Instruction No. 1.
>
> "The Court instructs the jury that the evidence in this case is insufficient to authorize a verdict in favor of the plaintiff, and directs the jury to return a verdict in favor of the defendant." (Rec., pp. 110–111).

## ARGUMENT.

The Specifications of Error above set out divide generally into two groups.

FIRST, those based upon the refusal of the Court to direct a verdict for defendant at the close of the plaintiff's evidence and at the close of all the evidence, his refusal to set aside the verdict of the jury and to grant a new trial and his entering judgment on the verdict in favor of plaintiff. Under this head, we class Specifications of Error Nos. 1, 2, 4, 5, 6 and 7.

SECOND, that based upon the refusal of the Court to give Instruction No. 2, relative to assumption of risk, as follows:

> "The Court instructs the jury that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of The Kanawha and Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein."

Under this head, we class Specification of Error No. 3.

### I.

The Court erred in refusing to arrest the evidence from the jury and to direct a verdict in favor of defendant at the close of plaintiff's evidence, and the Court erred in refusing to direct a verdict for defendant at the close of all the evidence.

## THE FACTS.

1. At the close of Plaintiff's evidence, the facts proved were about as follows:

Thomas P. Barry, an experienced railroad yard brakeman, considered by his fellow-employees as a good brakeman, with a knowledge of signals, switches, etc. (Rec., p. 39) was employed by The Kanawha and Michigan Railway Company as such Brakeman in its yard at Charleston, W. Va., and had been so employed for about a month prior to the accident (Rec., pp. 31 and 39).

Among other industries served by the yard crew was The Kanawha Brewing Company, which had a private siding leading from the tracks of The Kanawha and Michigan Railway Company to its plant (Declaration—Rec., pp. 2 to 5, inclusive; Rec., pp. 10 and 19), over which the switching crew of the Railway Company went once or twice a day to serve the Brewing Company either in setting in cars or taking out cars (Rec., pp. 23 to 36).

The Kanawha Brewing Company was erecting a bottling house directly across the side-track from its other plant and the carpenters engaged in the erection of this building had placed a scaffolding, or two pieces of timber, across the track from the bottling house to the temporary office, high enough to clear an ordinary box car by from three to four feet (Rec., pp. 19 to 23). This had been in place over and across the track for at least three weeks prior to the accident (Rec., pp. 20–23).

This scaffolding was in plain view of a person approaching it from either direction on the side-track (Rec., pp. 15 and 37).

Barry must have gone under the scaffolding when he went in on the side-track just prior to his death.

No evidence was introduced to show that The Kanawha and Michigan Railway Company had any notice of the erection of the scaffolding over the side-track of the Brewing Company, or that The Kanawha and Michigan Railway Company could have prevented its erection had it had notice.

It appears in the evidence that Barry failed to look in the direction the train was running, so that this failure to look was probably the proximate cause of the accident (Rec., pp. 16-17-19).

The only negligence pleaded in the declaration was "that the said defendant wrongfully, carelessly and negligently allowed and permitted the Brewing Company to erect and maintain the said obstruction across the said switch or side-track and allowed and permitted the said obstacle to there remain," and this allegation was not supported by any proof.

There was some evidence tending to show that the crew entered the switch track in order to pick up the cars there for No. 99, a through freight train running from Dickinson, W. Va., to Corning, Ohio, and, therefore, that he was engaged in interstate commerce (Rec., pp. 13 and 35).

It is our contention that, since no negligence was shown on the part of the Railway Company, the Court should have directed a verdict in its favor.

It is our further contention that, even if the Court was of the opinion that there was some evidence of negligence on the part of the Railway Company, since the position of the timbers was patent and open to view, and since Barry had full opportunity to see the obstruction, that he must be held to have assumed the risk of being injured thereby, and the Court should have directed a verdict for defendant.

2. At the close of all the evidence, plaintiff had still failed to sustain his burden of proving negligence on the part of the Railway Company, and actual knowledge upon the part of Barry of the presence of the timbers across the track was established (Rec., pp. 47-48-49) by the testimony of J. G. Forbes, a fellow-brakeman, that he had personally warned Barry of the presence of the timbers and that he had frequently ridden under the timbers with Barry on the tops of box cars, and the testimony of Conductor James A. Wintz that he had personally notified Barry of the danger to be apprehended from the presence of the timbers over the track (Rec., p. 51). The fact that the timbers were in plain view from both directions to persons on the side-track was further strengthened by the testimony of Conductor Wintz (Rec., p. 51), and the fact was also proved that all of Barry's work had been done in the yard under Conductor Wintz and during the daylight hours, when the obstruction was plainly observable (Rec., p. 51).

Under such a state of facts, we believe there is no doubt the Court erred in refusing to direct a verdict for the defendant.

## THE LAW.

"1. A decision of the highest court of a state, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service act of March 4, 1907 (34 Stat. at L. 1416, chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321), and the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and in which, at the close of the evidence, defendant had requested the court to instruct the jury to find in its favor, necessarily involves an adverse determination of a Federal question, i. e., defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the state court."

First proposition of the syllabus in the case of *St. Louis, Iron Mountain & Southern Railway Company vs. McWhirter*, 229 U. S., 265, 57 L. Ed., 1179.

"4. The evidence will be analyzed by the Federal Supreme Court on a writ of error to a state court to the extent necessary to give the plaintiff in error the benefit of its asserted Federal right."

Fourth proposition of the syllabus in the case of *North Carolina R. Co. vs. Zachary*, 232 U. S., 248, 58 L. Ed., 592.

The burden of proving negligence on the part of the defendant rested upon the plaintiff.

*Southern Railway Co. vs. Bennett*, 233 U. S., 80, 58 L. Ed., 860.

The Railway Company was not liable unless negligence was shown.

Federal Employers' Liability Act, Sec. 1.

*Southern Railway Co. vs. Bennett*, 233 U. S., 80, 58 L. Ed., 860.

*Seaboard Air Line Railway vs. Horton*, 233 U. S., 492, 58 L. Ed., 1062, opinion, page 502.

> "To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common law rule, certainly the act now limits the responsibility of the Company as indicated."
>
> *Seaboard Air Line Railway vs. Horton, supra.*

The declaration did not allege a violation of the safety appliance acts and no proof of such violation was offered, so that the doctrine of res ipsa loquitur could not be applied and assumption of risk and the negligence of plaintiff were available as defenses.

Federal Employers' Liability Act, Secs. 3 and 4.

> "6. The elimination of the defense of assumption of risk by the employers' liability act of April 22, 1908, sec. 4, in any case where the violation by the carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee, plainly evidences the legislative intent that in all other cases such *assumption of risk shall have its former effect as a complete bar to the action.*
>
> "7. The common-law rule with respect to the employee's assumption of risk of injury from a defective appliance governs an action brought under the employers' liability act of April 22, 1908, where such appliance is not covered by any Federal statute enacted for the safety of employees, to the exclusion of any state statutes which, like N. C. Revisal 1905, sec. 2646, abolished the assumption of risk as a bar to an action by a railway employee for an injury attributable to defective appliances furnished by the employer, since otherwise the subject-matter would

be controlled by the laws of the several states, and not by the Federal statute, which, in sec. 4, abolishes the defense of the assumption of risk only when the violation by the carrier of a Federal statute enacted for the safety of employees contributed to the death or injury of an employee."

*Seaboard Air Line Railway vs. Horton*, 233 U. S., 492, 58 L. Ed., 1063.

*Farley vs. N. Y., N. H. & H. R. Co.*, 87 Conn., 328.

Under the law of West Virginia contributory negligence and assumption of risk have always been available as defenses under the pleading of the general issue.

Hoggs Pleading and Forms, Sec. 228, pages 184-185.

"In an action of trespass on the case to recover damages of the character asserted in this case, the defendant may give in evidence under the general issue a release or accord and satisfaction, or whatever would in equity and good conscience according to the existing circumstances preclude the plaintiff from recovering, as in matters which operate a discharge of the cause of action or any justification or excuse."

Hoggs Pleading and Forms, page 185. *Ridgeley vs. the Town of West Grafton*, 46 W. Va., 445.

"In this state contributory negligence on the part of the plaintiff, where it does not appear by his own showing, is treated as a distinct wrong, which plaintiff need not defend against either by his pleading or proof, but is matter of defence, which must be proved by defendant, but it can be shown under the general issue."

*Woodell vs. West Virginia Improvement Company*, 38 W. Va., 23, opinion page 47; 17 S. E. 386.

The rule as to assumption of risk has been stated by this Court in the case of *Seaboard Air Line Railway vs. Horton*, 233 U. S., 492, 58 L. Ed., 1063:

> "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinary prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court.
>
> "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty."

The above is substantially the West Virginia rule as laid down in the cases of

*Williamson vs. Newport News and Mississippi Valley Company*, 34 W. Va., 657;

*Oliver vs. the Ohio River Railroad Company*, 42 W. Va., 703;

*Sanderson vs. the Panther Lumber Company*, 50 W. Va., 42.

> "Under the (federal) employers' liability act, if there was negligence on the part of the defendant, contributory negligence of the deceased does not bar a recovery, but only diminishes the damages in proportion to the amount of negligence attributable to such employee. Where, however, there is no negligence on the part of the master, but *the injury is solely the result of the employee's negligence*, there can be no recovery.
>
> *Pankey vs. A. T. & S. F. R. Co.*, 180 Missouri Appeals, 185.

It is the contention of the plaintiff in error that no negligence whatever on the part of the Railway Company was proved and that for that reason alone a verdict should have been directed in its favor, after the introduction of the evidence.

It is the further contention of the plaintiff in error that if any negligence is proved in the case it is the negligence of Barry in failing to use proper care to protect himself against injury, and that this negligence, if any, was the sole cause of the injury resulting in his death, and, as in the Pankey case, supra, he must be held to have voluntarily placed himself in a place of danger.

Plaintiff in error further contends that as the facts proved clearly show not only opportunity for Barry to know of the presence of the obstruction and the danger of being injured by it, but also actual knowledge of the presence of the obstruction and of the dangers surrounding it, that he must be held to have assumed the risk and that under these circumstances the defense of assumption of risk is "*a complete bar to the action.*"

Under either view of the evidence, it was clearly the duty of the trial court to instruct the jury to find in favor of the Railway Company, and the refusal of the Court so to instruct the jury denied to the Railway Company its rights to immunity from liability under the Federal Employers' Liability Act, and is, therefore, error, calling for a reversal of the judgment herein complained of.

*St. L., I. M. & S. R. Co. vs. McWhirter*, 229 U. S., 265, opinion page 282.

The law of West Virginia recognizes the direction of a verdict for the defendant as a proper practice.

> "The defendant asked, but was refused, an instruction that the evidence was not sufficient to authorize a verdict for the plaintiff and that the jury should find for the defendant. * * * We have often said that where the evidence is such in cases of negligence as that the Court would be compelled to set aside a verdict for the plaintiff, there the Court ought, if asked, direct a verdict for the defendant. *Ketterman vs. Railroad Co.*, 48 W. Va., 606; *Cobb vs. Glenn Boom Co.*, 57 Id., 49. In *White vs. Brewing Company*, 51 W. Va., 259, the same test is made, that is, that the Court should instruct a jury for a party in whose favor the evidence 'plainly and decidedly preponderates'."

*Hoylman vs. Railway Co.*, 65 W. Va., 264, opinion page 270.

The above argument is applicable to Specifications of Error Nos. 1, 2, 4, 5, 6 and 7, and we ask that it be considered in connection with each of the Specifications of Error referred to, since all involved the failure of the Court properly to apply the Federal Employers' Liability Law to the uncontradicted facts in evidence. First, in the failure of the Court to direct the jury, at the close of plaintiff's evidence, to find a verdict in favor of the Railway Company (Fifth Assignment of Error); second, in the failure of the Court, at the close of all the evidence, to direct a verdict in favor of the defendant (Sixth Assignment of Error); third, the refusal of the Court to give Instruction No. 1, asked by defendant at the close of all the evidence (Seventh Assignment of Error), and, finally, the failure of the Court to set aside the verdict of the jury and to grant the defendant a new trial herein (Fourth Assignment of Error).

We believe the Assignments of Error above referred to are covered by our First and Second Assignments of Error, set out in the Record, pages 122–123.

## II.

The Court erred in refusing to give Instruction No. 2, requested by the defendant below before argument to the jury (Rec., p. 110). This Instruction is as follows:

> "The Court instructs the jury that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of The Kanawha and Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein."

For a statement of the facts proved at the time this Instruction was requested, we respectfully refer the Court to the facts set up in Section 1, supra. As has been heretofore said, no allegation of a violation of a statute is alleged in the declaration and no such violation was proved at the trial, so that under the interpretation of the law by this Court in the case of *Seaboard Air Line vs. Horton, supra*, the Instruction requested was a proper one and should have been given, especially since the *uncontradicted evidence* clearly showed actual knowledge on the part of Barry of the presence of the obstruction over the track and of the dangers surrounding it (Rec., p. 47).

> Q. How long had it been there prior to Mr. Barry's injury?
>
> A. Well, I don't know. Don't know that, but I think it was pretty near the whole time Mr. Barry was working for the Company—must have been there something like a month.
>
> * * * * * * * * * * *
>
> Q. What knowledge of this strip did Mr. Barry have?
>
> A. Why, I told Mr. Barry to be careful and watch this piece of timber, myself, and I and Mr. Barry had passed under it ourselves, and we had to get down this way (witness stoops quite low) to get under the piece of timber on the box car and I told him several times about watching.

On cross-examination, the above testimony was repeated (Rec., p. 47).

> Q. You say Barry and you had often gone under this obstruction together, or you had often seen Barry go under it when he was braking on the same train with you?
>
> A. Yes, sir.

Q. You had often seen that?

A. Yes, sir.

Q. And you and he had stooped under this projection or obstruction on the top of the same box car together?

A. Yes, sir.

Q. How did you have to stoop to get under it?

A. (Witness stoops nearly double).

Q. Like that?

A. Yes, sir. (Rec., p. 48).

Q. What, then was the occasion of your telling Mr. Barry that this obstruction was there, if you have gone under it together that way?

A. I told Mr. Barry—I don't know whether at that time, but I told Mr. Barry when he first commenced to work, about this piece of timber there, even cautioned him when we would go in there that there was a piece of timber there, because I knew it was there.

Q. Barry and you both went in there together, did you?

A. Yes, sir.

Q. And both of you stooped down like this, and got under it?

A. Yes, sir.

Q. And why did you tell him it was there?

A. I had told Mr. Barry it was there before we ever went in there together.

Q. And before ever Barry went in there?

A. Yes, sir; it was probably twice a day, and sometimes three times a day that we would go in there. Of course I didn't tell Mr. Barry every time to look out you would get knocked off."

And on re-direct examination (Rec., p. 49):

Q. Mr. Cato asked you if you had told Mr. Barry when he first went there about this obstruction. Will you please tell the jury what Mr. Barry told you when you instructed him of this obstruction?

> A. I told Mr. Barry the night when we were going under this piece when he first—Mr. Barry told me that I needn't look out for him, that he was an experienced man, and would look out for obstructions himself.

See also the testimony of Mr. James A. Wintz (Rec., pp. 50–51), where the following appears:

> Q. How long had that (the obstruction) been there, Mr. Wintz?
>
> A. I would think they had been there thirty days, probably might have been a few days—probably might not have been so long.
>
> Q. How long had Mr. Barry been working for the K. & M. and in your crew?
>
> A. I think he did about all the braking he done was for me. I think he commenced about the first of the month, and worked up until the 23rd.
>
> A. Are you working in daylight, or dark—night?
>
> A. Working in daylight.
>
> Q. This accident happened in daylight or dark?
>
> A. Accident happened in daylight.
>
> Q. What knowledge, if any, do you know that Mr. Barry had of these obstructions over this spur?
>
> A. I notified him about the overhead pieces to be careful and watch out for them.

Under such a state of facts it certainly was the duty of the trial court to give the Instruction requested and above set out.

> "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty."
>
> *Seaboard Air Line Railway vs. Horton*, 233 U. S., 492, 58 L. Ed., 1063, opinion page 505.

We are not unaware that the jury found that Thomas P. Barry, at the time of the accident, did not know that the piece of timber across the track at Kanawha Brewing Company was so low that it would not clear him while standing upon the top of a box car, and our answer to this is that there is absolutely no evidence in the whole case to warrant such a finding and that the findings of the jury in answer to Interrogatories Nos. 1 and 2 (Rec., p. 112) are directly contrary to the facts proved. The answers of the jury to these Interrogatories, however, do not negative the uncontradicted evidence that the obstructions over the track were in clear view of any one who looked for them and that the position of the obstructions and the danger therefrom were "so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them," as shown by the fact that Engineer Leonard, a witness for plaintiff, Brakeman Hudson, a witness for plaintiff, James Forbes, a witness for defendant, James A. Wintz, a witness for defendant, and Albert Wright, a witness for plaintiff, not a railroad man but employed by the Brewing Company, obtained knowledge of the presence of the obstruction, just as Barry had opportunity to do; and a man of Barry's experience, as shown by his application for employment (Rec., pp. 59 and 60), to-wit, Brakeman and Conductor with B. & O. Railway, January, 1904, to May, 1907; Brakeman for McKeesport Connecting Railway, June, 1907, to May, 1909, must be held to have appreciated so obvious a risk.

The evidence as to Barry's actual knowledge of the presence of the obstruction and of the danger incident thereto was absolutely uncontradicted and there was no testimony from which even an inference of contradiction could be deduced.

The evidence that the obstruction was in such position that its location and the danger therefrom were "so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them" was absolutely uncontradicted and was supplied to a large extent by plaintiff's own witnesses.

Under these conditions the Court should have directed a verdict for defendant and there should have been no occasion then for the jury to show its prejudice and bias by findings so directly opposed to all the evidence in this case.

In this connection it might be mentioned that in the Horton case the jury answered a similar question:

> "1. Was the plaintiff injured by defendant's negligence? Answer: Yes.
>
> 2. If so, did plaintiff assume the risk of injury? Answer: No."

A similar situation arose in the case of *Melton vs. the Chesapeake and Ohio Railway Company*, 64 W. Va., 168, decided March 24, 1908. We quote literally from the opinion:

> "The great question of the case is, was Myers killed at a public crossing or while using the track elsewhere for walking? For the rights of Myers and the liability of the defendant would be different in the two cases. The Court put to the jury this interrogatory: "Was Peter Myers killed at a public crossing?" The answer was, "Yes." This answer is entirely unwarranted by the evidence. If anything can be said to be established by the oral evidence and undisputed physical facts, it is that Myers was

> struck by the tender of the locomotive 75 yards from the public crossing while using the track for a walkway. (Then sets out resume of evidence showing that Myers could not possibly have been killed at a crossing). * * * These facts are beyond question, these physical facts. They must be regarded as concessa in the case, not being disputed by any evidence. * * * The finding that Myers was killed at the crossing is so contrary to the evidence that it seems to be the child of prejudice doing injustice."

In the Horton case, 233 U. S., 492, and in the McWhirter case, 229 U. S., 265, the jury necessarily found against the contention of the railway company, but the Court held, particularly in the McWhirter case, that the failure of the court below to direct a verdict, when the evidence clearly called for a direction, was reversible error.

## CONCLUSION.

Plaintiff in error, therefore, prays that the judgment of the said Circuit Court of Kanawha County, West Virginia, may be reversed and set aside and held for naught, and that plaintiff in error may have judgment granting it its just and lawful rights under the constitution and laws of the United States, and that it may be restored to all things which it has lost by this action and because of said judgment and decision of said Circuit Court of Kanawha County, West Virginia.

Respectfully submitted,

W. N. King and Leroy Allebach,
*Attorneys for The Kanawha and*
*Michigan Railway Company,*
*plaintiff in error.*

7

Office Supreme Court, U. S.
FILED
DEC 6 1915
JAMES D. MAHER
Clerk

No. 24,167.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

## No. 199.

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THE KANAWHA AND MICHIGAN RAILWAY COMPANY, Plaintiff in Error,

*vs.*

T. L. KERSE, Administrator of the Estate of Thomas P. Barry, Deceased, Defendant in Error.

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IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE OF WEST VIRGINIA.

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## BRIEF OF DEFENDANT IN ERROR.

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GEO. A. BERRY,
R. F. DOWNING,
CATO & BLEDSOE,
*Attorneys for Defendant in Error.*

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No. 24,167.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

## No. 129.

---

THE KANAWHA AND MICHIGAN RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

T. L. KERSE, ADMINISTRATOR OF THE ESTATE OF THOMAS P. BARRY, DECEASED, DEFENDANT IN ERROR.

---

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE OF WEST VIRGINIA.

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## NOTICE OF MOTION.

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To W. N. KING and LE ROY ALLEBACH, *Attorneys for Plaintiff in Error:*

Please take notice, in connection with the hearing of the above-entitled cause on the merits, that the defendant in error proposes to submit for the consideration of the court a motion to affirm the decree of the court below in this cause, printed copy of such motion and brief in support thereof, and brief in support of defendant's case upon the merits is heerto attached and served upon you.

GEO. A. BERRY,
R. F. DOWNING,
CATO & BLEDSOE,
*Attorneys for Defendant in Error.*

No. 24,167.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 129.

THE KANAWHA AND MICHIGAN RAILWAY COMPANY,
*Plaintiff in Error,*

*vs.*

T. L. KERSE, *Administrator of the Estate of Thomas P. Barry, Deceased, Defendant in Error.*

---

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY,
STATE OF WEST VIRGINIA.

---

## MOTION TO AFFIRM.

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Now comes the appellee in the above-entitled cause and, in connection with the hearing of the above case on its merits, moves this honorable court to affirm the decree of the court below, on the ground that it is manifest that the appeal was taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

In connection with the above motion, as well as the hearing on the merits, counsel for the appellee desire to direct the attention of the court to the maze of incompetent and irrelevant testimony incorporated in the transcript of record, which could by no possibility throw any light upon the questions raised here on appeal, as well as the manner in which it has been set forth in the transcript of record, which is in direct violation of section 2 of rule 4 of this court, and which practice has time and time again, in no uncertain terms, received the condemnation of this honorable court. It will be observed that the entire testimony taken at the trial, including all the depositions, application for employment by Barry, application for insurance, and what-not, is set out *verbatim*. Counsel for the defendant in error respectfully submit that all the testimony throwing any light upon the issues involved in this case could be condensed within a record not exceeding twenty-five pages, whereas the present record contains one hundred and twenty-seven pages, thereby unnecessarily increasing the labors of both court and counsel.

No. 24,167.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 129.

THE KANAWHA AND MICHIGAN RAILWAY COMPANY,
*Plaintiff in Error,*

*vs.*

T. L. KERSE, *Administrator of the Estate of Thomas P. Barry, Deceased, Defendant in Error.*

---

IN ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE OF WEST VIRGINIA.

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## BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION, &c.

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### Statement.

This is a suit by the plaintiff in the Circuit Court of Kanawha County, West Virginia, to recover damages from the defendant railway company for the alleged wrongful killing of his decedent, Thomas P. Barry. The substantial facts in evidence were as follows: Barry was an experienced brakeman, who had been in the employ of the defendant as a member of the yard crew for about three weeks prior to his death. The Kanawha Brewing Company owned a switch track running through its premises and connecting with the main line of the defendant. That said spur or switch track was a curve of about 22°. That some time prior to the 23d day of April, 1911, in connection with a new bottling house, then in process of erection, the said Brewing Company had placed a piece of timber about two inches thick and six inches wide almost horizontally across said switch track or spur, fastening one end of the timber to the bottling house and the other end to a temporary frame building on the opposite side of the track. The purpose for which this timber was placed there was not disclosed by the evidence. This timber ran across the track at a height, as testified by the witnesses, varying from 3 to 4½ feet above the top of an ordinary box car. The evidence is conflicting as to the length of time the timber had been across the track when Barry was killed, the witnesses fixing it from two or three days to a month prior to his death. It was necessary for the different members of the yard crew of the defendant, which numbered probably as many as twenty different employees, to pass in and out of the switch and under this obstruction each day, and sometimes oftener. It also appeared in the evidence of the defendant that this timber across the track could be seen only for a distance of about two car lengths before approaching it by those on top of the car, this condition being due to the sharpness of the curve at that point. The evidence was also conflicting as to the number of timbers across the track at the point at which Barry was killed, four witnesses for the plaintiff, including the engineer of the train, stating that there was only one, and two witnesses for the defendant, viz., James Forbes, a brakeman in the employ of the plaintiff in error, and James A. Wintz, the conductor of the crew of which Barry was a member, testifying positively that there were two timbers spanning the track at that point. On the 23d day of April, 1911, the switching crew of which Barry was that day a member went upon the switch to haul a car standing on it to the main line. Leonard, the engineer, testified that Wintz, the conductor, told him to run in on the Brewing Company switch and take out a car for "99"; that "99" was a fast freight running from West Virginia into Ohio. Hudson, a witness for the plaintiff, also testified as to the interstate character of this train, and the defendant offered practically no evidence to dispute the interstate character of train "99," or the fact that the car from which Barry was knocked was to be placed into said train.

The engine in charge of Leonard backed in on the switch. Barry coupled on the car, which was an ordinary box car, and climbed to the top of it. Leonard then started to pull out of the switch, and Barry, who was standing near the rear end of the car, and sidewise, presumably watching Wintz, the conductor, who was standing on the ground in charge of said train, as the train proceeded, came in contact with this piece of timber across the track and was knocked from the top of said car, his skull was fractured by the fall and he died within a few hours thereafter.

Upon the trial of the cause in the Circuit Court a verdict was rendered in favor of the defendant in error in the sum of $1,200. That before said case was submitted to the jury the court, at the special instance and request of the plaintiff in error, submitted to be answered by the jury the following interrogatories (Rec., p. 112):

> Interrogatory No. 1. "*Did Thomas P. Barry, at the time of the accident, know that the piece of timber was stretched across and over the defendant's track?*" *To which interrogatory the jury answered "No."*
>
> Interrogatory No. 2. "*Did Thomas P. Barry, at the time of the accident, know that the piece of timber across the track at the Kanawha Brewing Company was so low that it would not clear him standing upon the top of a box car?*" *To which interrogatory the jury answer "No."*
>
> Interrogatory No. 3. "*Was Thomas P. Barry, at the time of his death, engaged in interstate commerce or commerce between two or more States, or was he engaged in commerce wholly within the State of West Virginia?*" *To which interrogatory the jury answered "Interstate commerce."*

A motion for a new trial was filed and argued before said Circuit Court, and upon the hearing thereof the same was denied. That thereafter plaintiff in error applied to the Supreme Court of Appeals of the State of West Virginia for a writ of certiorari to review the judgment of the lower court, and said Court of Appeals, on February 12, 1914 (Rec., p. 113), refused the writ of error, "the court being of the opinion that the judgment complained of *is plainly right.*"

That some time thereafter the plaintiff in error applied to this honorable court for a writ of error to review the judgment of said court, and this honorable court, by Mr. Chief Justice White, did, on the 25th day of March, 1914, grant said writ.

## ARGUMENT.

Plaintiff in error seeks to have the judgment of the Circuit Court and the Supreme Court of Appeals of West Virginia reversed upon two grounds: 1st, that the trial court erred in refusing "to direct a verdict for the defendant at the close of the plaintiff's testimony and at the close of all the evidence, and his refusal to set aside the verdict of the jury and to grant a new trial, and his entering judgment on the verdict in favor of the plaintiff."

In determining the question as to whether or not the trial court so erred, defendant in error deems it necessary and proper to give a brief recital of the evidence before the court and jury at that time, particularly in view of the condition of the transcript of record in this case.

> As to the presence of the pieces of timber across the track there can be no dispute, four witnesses for the plaintiff—viz., M. F. Leonard (Rec., p. 11), George W. Bogges (Rec., p. 19), Albert Wright (Rec., p. 21), and Everett D. Hudson (Rec., p. 32), having so testified, and James Forbes and Jas. A. Wintz for the defendant. It is true that some witnesses say there was

> one piece of timber and others say there were two pieces of timber at that point, but that is not material. As to the clearance of said timber above the top of an ordinary box car the witnesses vary, some placing it at three, others at four-and-a-half feet. As to the length of time that those timbers were across the track the witnesses also varied, Leonard placing it at from two to three days (Rec., p. 15) prior to Barry's death, and the others from three weeks to a month. Wintz testified (Rec., p. 50) as follows: "Q. How long had that been there, Mr. Wintz (referring to the timber)? A. I would think they had been there thirty days, probably might have been a few days—probably might not have been so long."

Defendant in error claims that Barry was without knowledge of the presence of the timber across the track, and to substantiate said contention produced the witness Leonard, an engineer of the company, who was in the employ of the road for over two years and frequently employed in hauling cars from the plant of the Brewing Company, who testified (Rec., p. 15) that the day Barry was killed was the first time he saw him on that train; that just before the instant of contact he was looking at Barry and Barry was standing in a sidewise position looking towards the rear of the train, a position, appellee respectfully submits, incompatible with knowledge on Barry's part of the presence of said timber and the dangers connected therewith. The appellee was without further evidence on this point, Barry having been killed and his mouth closed. It will also be observed that Leonard was the only eye-witness to the accident, both Forbes and Wintz being at other places at the time Barry came in contact with said timber. Out of all of the employees at the command of the defendant, and who had worked with Barry, only two were produced who testified that Barry had any knowledge of the presence of said timber or timbers, those witnesses being Wintz, the conductor, and Forbes, a brakeman. Forbes testified (Rec., p. 47) in substance, that he told Barry to be careful of this piece of timber, that they had passed under it several times, and that they had to stoop down in order to avoid it, and Wintz (Rec., pp. 50-51) also testified in sustance, that he notified Barry of the overhead pieces and to watch out for them. Outside of these two men not a single witness out of all the people who were employed with Barry at or about that time was produced to show knowledge on the part of Barry, either actual or constructive. The credibility of both Forbes and Wintz were attacked by counsel for defendant in error, and it will be apparent from an examination of the record that the jury not only placed no credence in the testimony of either of them, but must have disregarded their testimony entirely, and were justified in so doing. The jury was there, had the advantage of seeing both of these said witnesses on the stand, their demeanor and deportment, and was the sole judge of the credibility of their evidence. The trial court also had that advantage, and apparently, by refusing to grant the motion for a new trial, adopted the views of the jury in regard to the credibility of the testimony of Wintz and Forbes. The defendant contends (page 15 of Brief) that there was no evidence introduced to show that the Kanawha & Michigan Railway Company had notice of the erection or presence of said timbers across this track. An examination of the record will show that not only did Leonard, Wintz, and Forbes, all employees of the Railroad Company, testify as to its presence, but on the contrary not a single official of the company was produced to testify as to the lack of such knowledge.

That at the conclusion of all the aforesaid testimony, as hereinbefore mentioned, defendant propounded certain special interrogatories to be answered by the jury as to whether or not Barry had knowledge of the presence of these timbers across the track, and whether or not at the time of his death he was engaged in interstate commerce. In each instance the findings of the jury were adverse to the plaintiff in error and the trial court refused to disturb those findings, as did the Supreme Court of Appeals of West Virginia (Rec., p. 115) upon application for a writ of error.

It is the well-settled law of this court that the facts, and the conclusions to be drawn from them, are for the jury and cannot be reviewed by the Federal Supreme Court upon writ of error.

Standard Oil Co. *vs.* Brown, 218 U. S., 78, 87; 54 L. Ed., 939.

Julian Herencia *vs.* Felix Guzman, 219 U. S., 44; 55 L. Ed., 81.

In the latter case this court says:

> "The argument on behalf of the plaintiff in error proceeds upon the assumption that this court may review the evidence as to negligence and as to the damages recoverable, and may reverse the judgment if the court is dissatisfied with the findings of the jury. This, however, is not the province of the court upon writ of error. As there was evidence proper for the consideration of the jury, the objection that the verdict was against the weight of evidence, or that the damages allowed were excessive, cannot be considered."

To the same effect are the following cases:

United States Exp. Co. *vs.* Ware, 20 Wall., 543; 22 L. Ed., 422.

New York, L. E. & W. R. Co. *vs.* Winter, 143 U. S., 60, 75; 6 L. Ed., 71, 80; 12 Sup. Ct. Rep., 356.

Lincoln *vs.* Power, 151 U. S., 436, 438; 38 L. Ed., 224, 225; 14 Sup. Ct. Rep., 387.

Humes *vs.* United States, 170 U. S., 210; 42 L. Ed., 1011; 18 Sup. Ct. Rep., 602.

## Was the Defendant, at the Time of Barry's Death, Engaged in Interstate Commerce?

It was testified by Leonard that he was told to go in and get this box car for "99," which was a through freight running between points in West Virginia and points in Ohio. Hudson, a witness for the plaintiff, gave evidence also as to the interstate character of the train known as "99," as did also Richardson, the freight agent of the defendant, who was introduced as a witness for the plaintiff. The only evidence to the contrary, that Barry was not engaged in interstate commerce at the time of his death, was that of the witness Wintz. It will be noted that notwithstanding that the defendant must have been in possession of knowledge as to the particular character of the commerce in which Barry was engaged, not a witness or scintilla of evidence was introduced to prove that he was not engaged in interstate commerce; in fact the jury found that he was at the time, and the plaintiff in error seems to have waived or abandoned any such question on appeal, as no reference is made to it in their brief. That Barry was engaged in interstate commerce at the time is abundantly supported by the following decisions:

Law *vs.* Ill. Cent. Ry. Co. (C. C. A., 6th C., 1913), 208 Fed., 869.

Ill. Cent. Ry. Co. *vs.* Nelson (C. C. A., 8th C., 1913), 203 Fed., 956.

Pedersen *vs.* Del., L. & W. R. Co., 1913, 229 U. S., 146.

Thompson *vs.* Columbia & P. S. R. Co., 205 Fed., 203.

B. & O. R. R. Co. *vs.* Darr, 204 Fed., 751.

S. A. L. R. R. Co. *vs.* Moore, 228 U. S., 433.

Behrens *vs.* Ill. Cent. Ry. Co., 192 Fed., 581.

Cent. R. Co. of N. J. *vs.* Colasurdo, 192 Fed., 901.

A. C. L. R. R. Co. *vs.* Reaves, 208 Fed., 141.

To seriously contend that the plaintiff ~~in~~ error was not guilty of negligence in permitting said timber to remain across its tracks and roadbed and kill or maim its employees, as was Barry in this case, would be an argument in favor of relieving the defendant from liability for all acts and omissions, negligent and criminal as well. Defendant in error can conceive of no greater negligence on the part of a railroad company than that of which defendant railroad company was adjudged guilty by the jury in this case.

## II.

The second assignment of error is based upon the refusal of the trial court to give the following instruction:

> "The court instructs the jury that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of the Kanawha & Michigan Railway Company, where his duties required him to pass under said piece of timber, then the said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein;"

or, in other words, the defendant sought by the aforegoing instruction to have the court charge the jury that the risk of being injured as the result of coming in contact with this piece of timber across the track of the defendant was one of the risks incident to his employment as a brakeman, which he assumed and for which injuries or death the said Barry or his administrator could not recover.

Appellee respectfully submits that there was no error in refusing to grant the aforegoing instruction, because, 1st. That, even if the defendant was entitled to an instruction on the question of assumption of risk, it will appear from the wording of the instant instruction, after an examination of the record, that the court would not have been justified upon the state of the evidence in granting the same; that the instruction was vague and indefinite and did not clearly and concisely put before the jury all the facts upon which such an instruction could be based. It will be observed that the instruction does not seek merely to impose upon Barry the risks incident to coming in contact with the timber while operating or working upon the top of box cars, but is so broad as to include injuries from any and all services, whether upon engines, flat-cars, or while engaged upon the ground and tracks of the defendant.

It is the well-settled law of this court that a judgment of a lower court will not be reversed upon the refusal to give an instruction to the jury if such refusal can be upheld upon any hypothesis.

2d. That the danger from injury from coming in contact with this piece of timber was not one of the risks incident to Barry's employment as a brakeman in the employ of the defendant. This proposition of law was earnestly urged both upon the Circuit Court and the Supreme Court of Appeals of West Virginia by appellee and sustained, and it is urgently urged here. It was urged upon the court at the trial of said case, and it is here urged, that Barry's death was not due so much to the negligence of the defendant because of any defect or insufficiency in the cars, engines, appliances, &c., of the defendant, but was due to the *direct negligence of the defendant, its agents and employees,* in permitting said piece of timber, with knowledge of its construction and dangerous character, &c., to remain over the tracks at the places stated, where the same was liable to injure and did injure its employees. And it is respectfully submitted that the decision of this court in the case of S. A. L. Ry. Co. *vs.* Horton, 233 U. S., 501, 505, sustains the contention of appellee. In that case, on page 501, this court says, speaking of the first section of the act of Congress known as the Employers' Liability Act:

> "This clause has two branches; the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow-employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence."

The facts of the aforesaid case are easily differentiated from the facts in the case at bar. In the Horton case the engineer was injured as the result of the bursting of the gauge glass, which was unprotected by a guard glass, of which fact Horton was aware. Not only did he appreciate the danger incident to driving the locomotive without the guard glass, as appeared from his testimony, but he had it within his power to eliminate the danger from explosion by the use of gauge cocks and failed to so do, and he also continued to drive said locomotive using the unprotected gauge glass and not using the gauge cocks from July 27 until August 4, 1910, the date of his injury. That was a case in which the man was aware of and appreciated the dangers *incident* to his employment, while in the case at bar it was a case of injury as the result of coming in contact with an obstruction of which the deceased not only did not have knowledge, but it was also an instrumentality in no way used by the defendant or necessary to be used by it in the prosecution of its business. It was nothing more or less than a death trap, erected by third parties over the tracks of the plaintiff in error, and which was permitted to remain over said tracks by the defendant Railroad Company, its officers and agents, with knowledge of its presence and dangerous character. In speaking of the risks which the employee assumed, this court, in the Horton case, said, page 504:

> "On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workmen—danger which must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court.
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> "Choctaw, O. & G. R. Co. *vs.* McDade, 191 U. S., 64, 68; 48 L. Ed., 96, 100; 26 Sup. Ct. Rep., 24; 15 Am. Neg. Rep., 230.
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> "Schlemmer *vs.* Buffalo, R. & P. R. Co., 220 U. S., 590, 596; 55 L. Ed., 596, 600; 31 Sup. Ct. Rep., 561.
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> "Texas & P. R. Co. *vs.* Harvey, 228 U. S., 319, 321; 57 L. Ed., 852, 855; 33 Sup. Ct. Rep., 518.
>
> "Gila Valley G. & N. R. Co. *vs.* Hall, 232 U. S., 94, 102; 58 L. Ed., 521, 524; 34 Sup. Ct. Rep., 229, and cases cited."

The Horton case, as counsel comprehends it, simply decides that the act of Congress of April 22, 1908, and amendments, known as the Employers' Liability Act, does not make the carrier an insurer against all injuries to its employees, but does make it liable for injuries sustained by them either through negligence of *its officers, agents, or employees,* or through its negligence in the maintenance and care of its cars, engines, appliances, machinery, roadbeds, boats, wharves, or other equipment It is true that while the court held in the above case that the defense of assumption of risk was not abrogated by said act, and that the employee must be held to assume the ordinary risks incident to his employment, it also holds with equal force that the employee does not assume risk of injury as the result of the *negligence of the carrier, its officers, agents, or employees,* nor does he assume any risk of injury as the result of the failure or negligence of the defendant in failing to maintain its roadbed, cars, appliances, etc., in a reasonably safe and proper condition.

In cases of what may be called transitory obstructions, as opposed to the permanent obstructions, such as bridges and tunnels, the trainmen are not to be charged with knowledge thereof; consequently the defense of assumption of risk and contributory negligence is not open to the masters.

In the case of Erslew *vs.* New Orleans & N. E. R. Co., 49 La. Ann., 86, the court held that it was negligence on the part of the steam railroad to permit an electric street car company to so construct and maintain over its tracks a guy wire that it will endanger the lives of its servants and employees. To the same effect is the decision in the case of New York, N. H. & H. R. Co. *vs.* O'Leary, 33 C. C. A., 562; 93 Fed., 737.

In the case of Holden *vs.* Fitchburg R. Co., 129 Mass., 268, the railroad company was held liable for permitting, for several days, a derrick to stand in close proximity to the track with a guy wire stretched over the track and so insecurely fastened as to sag and to be dangerous to brakemen.

In the case of Gates *vs.* Chicago, M. & St. P. R. Co., 2 S. D., 422, the court said:

> "It is negligent, as a matter of law, for a railroad company to maintain an iron spout so attached to a water tank as to be a constant menace to lives and limbs of brakemen upon its trains passing under the spout, where it might readily be so constructed and hung as to be safe."
>
> Choctaw, O. & G. R. Co. *vs.* McDade, 191 U. S., 64; 48 L. Ed., 96; 24 Sup. Ct. Rep., 24; 15 Am. Neg. Rep., 230, affirming 50 C. C. A., 591; 112 Fed., 888.

To the same effect, Chesapeake & O. R. Co. *vs.* Cowley, 92 C. C. A., 201; 166 Fed., 283; Norfolk & W. R. Co. *vs.* Beckett, 90 C. C. A., 25; 163 Fed., 479.

A railroad company is negligent in maintaining a water-spout which is free to swing over the top of passing trains at such a distance above the cars as to render it dangerous to employees thereon.

Ohio, I. & W. R. Co. *vs.* Johnson, 31 Ill. App., 183.

Where a brakeman was caught around the neck by a rope hanging from a water pipe which had been negligently left hanging over the track, the railroad company is liable for the injuries received.

Lindsay *vs.* Norfolk & S. R. Co., 132 N. C., 59; 43 S. E., 511; 13 Am. Neg. Rep., 597.

A railroad company is liable for injuries caused by a water-spout which is maintained in such a condition that it would swing out over the train.

Greenleaf *vs.* Dubuque & S. C. R. Co., 33 Iowa, 52; 14 Am. Neg. Cas., 607.

A railroad company is liable for injuries to a brakeman on a car by being struck by a waterspout maintained so near the track that, when raised to its highest position, it would hit a man of ordinary height standing on top of the car a foot or two to the side of the running board, unless he dodged it, where the injured employee had been over the road but twice, and the danger was not an obvious one.

McDuffee *vs.* Boston & M. R. Co., 81 Vt., 62; 130 Am. St. Rep., 1019; 69 Atl., 124.

The danger from a cattle chute erected over a track at a height not sufficient to clear a man standing on the top of cars is not a danger inherent in railroading.

Cales *vs.* Union Terminal R. Co., 124 Iowa, 48; 99 N. W., 108.

In Nance *vs.* Newport News & M. Valley R. Co., 13 Ky. L. Rep., 554; 17 S. W., 570, where a brakeman was knocked off a car by beams of a freight depot which projected over the track, a recovery was sustained. The court said:

> "Tunnels and bridges pertain to all roads, form a part of the road itself, and in operating trains the brakemen must be presumed to know the modes of construction and the danger in passing through or over them. Not so with a building, although used as a depot, where parts of it are necessarily known to be dangerous to the employer, and that part of it constituting the danger not necessary or used in the operation of the road."

And in Pittsburgh, C. C. & St. L. R. Co. *vs.* Parish, 28 Ind. App., 189; 91 Am. St. Rep., 120; 62 N. E., 514, it was held that a railroad company would be liable for injuries caused by the branches of a tree overhanging the railroad track where the employee who was injured had no knowledge of the dangerous condition.

If the defendants in the aforesaid cases were negligent, how much greater the negligence of the plaintiff in error in the instant case.

3d. The timber stretched across the track was such a danger as he was protected against by the plain terms of the Employers' Liability Act itself.

Far from being an ordinary risk of Barry's employment, we can imagine no more extraordinary danger and no greater hazard than was created by this piece of timber, crossing the switch track at a height where it was practically impossible for a railroad employee, on top of a moving car, either to get under or over it in safety. Indeed, it would have taxed the ingenuity to erect a more murderous contrivance than this, passing horizontally across the track at the height of about three feet above the top of the car and securely fastened at either end. It was a non-delegable duty of the defendant to keep the track, over which its employees were compelled in the performance of their duties to pass, reasonably free from all obstructions, and whether or not such obstructions were overhead or underfoot was, of course, immaterial. And the negligence of this defendant in permitting this particular man-trap to remain across the track after knowledge, or reasonable opportunity for knowledge, that it existed was as great a breach of its duty to Barry as if it had placed such obstruction there in the first instance.

But the construction of the Federal Employers' Liability Act is such as to render the State law, as applied to the facts of the case at bar, of no moment. In the case of *Wright vs. Yazoo & M. V. R. Company*, 197 Fed. Rep., 94, where an engineer was struck and killed by a number of cars which had been left standing on a side track "not in the clear," the railroad company attempted to defend by showing assumption of risk on the part of the decedent. It was there held:

> "Under Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat., 65, U. S. Comp. St. Supp., 1911, p. 1322), which makes interstate common carriers liable for negligent injury to employees, and which provides that an employee shall not be held

> to have assumed the risk of his employment where the employer has violated any statute enacted for the safety of employees, if the violation contributed to the injury, an employee assumes the risks of ordinary dangers incident to his employment, not including negligent acts of the carrier's officers, agents or employees or any defect or insufficiency, due to its negligence, in its cars, engines, appliances, tracks, roadbed, boats, wharves, etc., and a locomotive engineer does not assume the risk of being injured by his employer's negligence in leaving cars on a siding within striking distance of the engineer's train."

The court in its opinion said:

> "Taking this announcement of the two doctrines to be correct, as we must, which one, if either, applies as a bar in this case? Certainly it cannot be that of contributory negligence. The act of Congress forbids that. Is it the assumption of risk? Should it be said that one of the ordinary dangers of deceased's employment was that the carrier violated its own rule, requiring the cars left on sidings be placed in the clear so habitually that the servant knew or should have known of it, and by remaining in the service of the company assumed the risk incident thereto? What was the purpose of Congress in passing the Employers' Liability Act? If plain words are to be taken in their ordinary meaning, it was to make common carriers by railroad, while engaged in interstate commerce, liable in damages to any of its employees for injury or death suffered while he is employed by such carrier in such commerce, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, etc., and to provide that, although the employee may have been guilty of contributory negligence, that shall not bar a recovery, but shall go in reduction of damages, except that no employee shall be held to have been guilty of contributory negligence, or to have assumed the risk of his employment in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury of such employee.

> "It is conceded that the common-law rule that contributory negligence barred the right of recovery has been abolished by the act. Shall the courts destroy the effect of the act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents, or employees, upon the ground that the servant assumes the risk incident to the negligence of the officers, agents, or employees of the carrier? In view of the first section of the act, which provides that such common carrier shall be liable in damages to its employees, resulting in whole or in part from the negligence of any of its officers, agents, or employees, it is not permissible, in my judgment, to hold that the employee assumes the risk of his employment, which arises from the negligence of the officers, agents, or employees of the carrier. It is insisted that since the act provides that he shall not be held to have assumed such risk in cases only where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury, the maxim, '*Expressio unius est exclusio alterius,*' applies. I do not think this insistence is sound, or that it should be sustained.
>
> "As I construe the act, the risk that the employee now assumes is the ordinary dangers incident to his employment, which does not include, since the passage of this act, the assumption of the risk incident to the negligence of the carrier's officers, agents, or employees, or any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

To the instant case the facts and the reasoning of the Wright case are in every respect analogous and applicable. It is too obvious to merit discussion that Barry's death resulted from the neglect of either an officer, agent, or employee of the defendant in permitting such an obstruction to remain over the track upon which he was working. Inasmuch as the defendant is a corporation, and can only act or fail to act through one of these classes of persons, and the Federal statute includes all of those who represent a corporation, it i needless to inquire to which class the derelict representativ of the defendant belonged. And as said by the court in th Wright case (page 96): "If the contention that the doctrin of assumed risk is available, as a defense in this cas * * * then it would seem that the purpose of the ac would be defeated."

Was the defendant entitled to the aforegoing instruction It is respectfully submitted that under all the facts and circumstances, and in view of the decisions above cited, it wa not, and that the court committed no error in refusing t grant the same.

4th. Were the rights of the defendant in any way abridge by the refusal of the court to grant said instruction, or did i suffer any injury or damage because of said refusal?

It is respectfully submitted that it did not, because th jury, at the special instance and request of the defendant, decided by its answer to special interrogatories (Rec., p. 112) hereinbefore set forth, that Thomas P. Barry at the time o the accident did not know that the piece of timber whic caused his death was stretched across and over defendant' track, or that it was so low that it would not clear him standing on top of a box car while engaged in the performance o his duty. It will be seen, therefore, that if the instructio as requested had been granted, if it was a proper one, woul not have influenced the jury in any way, and its refusal, i it was error, it is respectfully submitted, under all the fact and circumstances of this case, was harmless error and in n way affected or could have affected the verdict or the right of the defendant. It is earnestly urged, therefore, that th verdict in this case should not be disturbed.

## Conclusion.

In conclusion it is respectfully submitted that there was no error committed by the trial court justifying this court in reversing the judgment entered in the above-entitled cause, and the judgment should be affirmed.

Appellee also respectfully submits that it is perfectly evident from an examination of the whole record and the questions involved that the appeal was taken for delay only, and that the questions upon which a reversal of the judgment is sought are frivolous. In view thereof defendant in error asks damages for delay at the rate of 10 per cent, in addition to interest, costs, etc., in accordance with section 2 of rule 23 of this court.

Respectfully submitted,

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*Attorneys for Defendant in Error.*

# KANAWHA & MICHIGAN RAILWAY COMPANY *v.* KERSE, ADMINISTRATOR OF BARRY.

## ERROR TO THE CIRCUIT COURT OF KANAWHA COUNTY, STATE OF WEST VIRGINIA.

**No. 129. Argued December 10, 1915.—Decided January 10, 1916.**

Where the highest appellate court of the State refuses to allow a writ of error to review a judgment based on a verdict, the writ of error from this court is directed to the trial court.

Under the Employers' Liability Act, the action lies for injury or death resulting in whole or in part from the negligence of the officers, agents or employés of such carrier.

To conduct switching operations upon a switch obstructed in such manner as to endanger the lives of brakemen upon its cars, is evidence of negligence on the part of the railroad company, and the existence of such an obstruction for a considerable period of time is presumptive evidence of notice to the company.

The burden of proof of assumption of risk is on the employer, and unless the evidence indisputably shows such assumption, the trial court does not err in refusing to take that question from the jury.

Knowledge of a fixed obstruction over a track in such position as not to clear a man standing on top of a box car necessarily imports a risk to an experienced brakeman; and, in the absence of evidence of objection on his part or promise of reparation by the employer, assumption of the risk.

The fact that the court erroneously refused defendant's request for an instruction as to plaintiff's assumption of risk based on the hypothesis of the latter's knowledge of an existing condition is not ground for reversal where the jury by a specific finding negatived that hypothesis.

THE facts, which involve the validity of a verdict and judgment in an action for injuries under the Employers' Liability Act, are stated in the opinion.

*Mr. Leroy Allebach* and *Mr. W. N. King* for plaintiff in error:

The court erred in refusing to arrest the evidence from the jury and to direct a verdict in favor of defendant, at the close of plaintiff's evidence, and the court erred in refusing to direct a verdict for defendant, at the close of all the evidence. A Federal question is involved; the burden of proving negligence is on the plaintiff; assumption of risk is available as a defense; assumption of risk need not be affirmatively pleaded under West Virginia law; the accident was caused solely by employé's negligence.

The court erred in refusing to give the instructions requested by the defendant below before argument to the jury. Defendant in error had actual knowledge of the presence of the obstacle over the track and knew of the dangers connected therewith. The finding of the jury is not supported by any evidence. The court could have avoided this error by directing a verdict, as requested.

In support of these contentions, see *Farley* v. *N. Y., N. H. & H. R. R.*, 87 Connecticut, 328; *Hoylman* v. *Railway Co.*, 65 W. Va. 264, 270; *Melton* v. *Ches. & Ohio Ry.*, 64 W. Va. 168; *North Carolina R. R.* v. *Zachary*, 232 U. S.

248; *Oliver* v. *Ohio River R. R.*, 42 W. Va. 703; *Pankey* v. *A., T. & S. F. R. R.*, 180 Mo. App. 185; *Ridgeley* v. *West Grafton*, 46 W. Va. 445; *St. L., I. M. & S. Ry.* v. *McWhirter*, 229 U. S. 265; *Sanderson* v. *Panther Lumber Co.*, 50 W. Va. 42; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 502; *Southern Ry.* v. *Bennett*, 233 U. S. 80; *Williamson* v. *N. N. & M. V. Co.*, 34 W. Va. 657; *Woodell* v. *W. Va. Improvement Co.*, 38 W. Va. 23, 47; Hogg's Pleading and Forms, § 228, pp. 184–85.

*Mr. George A. Berry*, with whom *Mr. R. F. Downing* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action under the Federal Employers' Liability Act to recover damages because of the death of one Barry, a brakeman in the Railway Company's yard at Charleston, West Virginia, on April 23, 1911. It was pleaded and was proved without dispute that he received injuries resulting in his death while employed in interstate commerce by the Railway Company, admittedly a common carrier. There was a verdict in favor of the administrator, and the Supreme Court of Appeals of West Virginia refused to allow a writ of error to review the resulting judgment; hence our writ was directed to the trial court.

The principal argument of plaintiff in error is addressed to the refusal of the court to direct a verdict in favor of defendant upon the ground that there was no proof of negligence on the part of the Railway Company, and that there was clear and undisputed proof that Barry assumed the risk of such an injury as that which resulted in his death.

It appears that Barry was an experienced yard brakeman, and was employed in that capacity by the Railway Company in its Charleston yard. Among the industries served by the yard was that of the Kanawha Brewing

Company, which had a private switch running through its premises and connecting with defendant's main line. Some time prior to April 23, 1911, carpenters in the employ of the Brewing Company had placed one or two pieces of timber, about 2 inches thick and 3 to 6 inches wide, in a horizontal position across the switch track and at a height between 3 feet and 4½ feet above the top of an ordinary box car. The timber was secured by nails to two buildings on opposite sides of the track. There was a conflict of testimony as to the length of time that the timber had been in position prior to the accident, witnesses fixing it at periods varying from two or three days to a month. It was necessary for members of defendant's yard crew to pass in and out of the switch and under the obstruction frequently. The timber was in plain view, but because of a sharp curve in the switch-track could be seen by those upon the top of a car for only a short distance when approaching it. On the twenty-third of April a switching crew, of which Barry was that day a member, went upon the switch to haul out upon the main line a car destined for interstate commerce. The engine, in charge of one Leonard, was backed in upon the switch, and Barry coupled up the car, which was an ordinary box car, and then climbed to the top of it. Leonard started to pull out of the switch, and as the train proceeded Barry, who was standing near the rear end of the car, and not looking forward, but sidewise (presumably watching Wintz, the conductor, who was standing upon the ground in charge of the train), came in contact with the timber and was thrown to the ground, sustaining a fracture of the skull, from which he soon died.

The action of the Railway Company, through its employés, in conducting its switching operations upon a switch obstructed, as this one was, in such manner as to endanger the lives of brakemen upon its cars, speaks so clearly of negligence that no time need be spent upon it.

The evidence that the timber had been in the position described for a considerable period of time was presumptive evidence of notice to the company, besides which the switch engineer and conductor both testified to actual knowledge on their part, prior to the time of the accident to Barry. Under the Employers' Liability Act (35 Stat. 65, c. 149, § 1) the action lies for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

Upon the question of assumption of risk, the case for the Railway Company was stronger. One Forbes, a fellow brakeman, testified that Barry had worked on the same crew with witness during all the time he was employed by the Company, this being "something like a month;" that the obstruction across the Brewing Company's track had been there "pretty near the whole time Mr. Barry was working for the company—must have been there something like a month;" that "I told Mr. Barry to be careful and watch this piece of timber, myself, and I and Mr. Barry had passed under it ourselves, and we had to get down this way (witness stoops quite low) to get under the piece of timber on the box car, and I told him several times about watching;" and that he and Barry probably went in on the switch together two or three times a day, and he had often seen Barry go under the obstruction. And Wintz, the conductor, testified that Barry commenced work for the company "about the first of the month, and worked up until the 23rd;" also that "I notified him about the overhead pieces, to be careful and watch out for them." This testimony, as seen in print, certainly seems convincing, although Wintz, upon cross-examination, could not say but that he had told Mr. Kerse, the administrator, that he and Barry had "never had any conversation at all about this overhead obstruction."

But there was substantial contradiction of the testimony of these witnesses. Leonard, the engineer of the yard locomotive, called as a witness for plaintiff, testified distinctly that the day on which Barry met his death was the first that the witness had seen him; that he did not know whether Barry was employed by the Railway Company or not. And one Greter, called by defendant, testified that it was to him Barry had applied for employment as yard brakeman, and he identified the written application signed by Barry; he also testified that Barry entered the service of the Company "about three or four days" after the application was approved. The application itself was introduced in evidence by defendant; it is dated March 31, 1911, and is indorsed "Approved, A. N. Lyon, Supt., 4/14/1911." The latter date, coupled with Greter's testimony, would seem to fix April 17th or 18th (five or six days before the accident) as the earliest date on which Barry was employed by the Railway Company. And this is so inconsistent with a material part of the testimony of Forbes and Wintz that the jury may reasonably have concluded that their testimony should be rejected *in toto*—*falsus in uno, falsus in omnibus*—and that in truth, as indicated by the testimony of Leonard, Barry had never worked upon the Brewing Company's switch previous to the time of the disaster. The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury.

Only one matter remains to be mentioned. The court refused to instruct the jury, as requested by defendant, "that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of

The Kanawha and Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein."

Since knowledge of a fixed obstruction over the track in such a position as not to clear a man standing upon the top of a box car would seem necessarily to import to an experienced brakeman that there was a risk of injury to him in that situation, and since there was no evidence of objection by Barry or promise of reparation by his employer to rebut the presumption that the risk was assumed, the refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment under review, because by specific findings of fact the jury negatived the hypothesis upon which alone the instruction was based. In response to particular interrogatories submitted by the court, they found that Barry did not know that the piece of timber was stretched over the track, and (of course) did not know that the timber was so low that it would not clear him when standing upon the top of the box car.

A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. And the refusal of an instruction as to the legal result that would follow only upon the hypothesis that the deceased knew of the presence of the timber, and knew it would not clear a man standing upon the top of a box car, became legally insignificant when the jury had in its findings distinctly negatived the facts that made up the hypothesis. Thus the progress of the trial rendered the error wholly immaterial to the merits. *Greenleaf's Lessee* v. *Birth*, 5 Pet. 132, 135; *Fidelity & Deposit Co.* v. *Courtney*, 186 U. S. 342, 351.

*Judgment affirmed.*